

# THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

## Review Meeting

Migration: Human Rights Protection of Smuggled Persons

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## HUMAN SMUGGLING, MIGRATION AND HUMAN RIGHTS

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“The extent of the flows of irregular workers is a strong indication that the demand for regular migrant workers is not being matched by the supply, with migrants serving as the buffers between political demands and economic realities.”<sup>1</sup>

ILO, 2004.

"We want our Border Patrol agents chasing crooks and thieves and drug runners and terrorists, not good-hearted people who are coming here to work".

President George W. Bush, December 20, 2004.<sup>2</sup>

### INTRODUCTION

1. Border crossing is not a legal right; it is not even a human right. But its regulation is a state right, a quintessentially domestic preoccupation. Unlike other interstate transfers, such as the movement of goods or services, which have long been the province of international initiatives, states have generally preserved their exclusive rights to encourage, limit, regulate or prohibit the movement of persons, migration. This is not surprising. A key aspect of state sovereignty is jealously guarded territorial demarcation, a sharp distinction between nationals and non nationals and - an essential feature of both - ultimate control over access to legal residence within state borders. So migration is generally permitted when it benefits the state, including situations where migration supplements a domestic need for labour, expertise or investment, provides a market for domestic businesses (education, tourism), or satisfies legal residents' legitimate expectations for family reunification. If migration is not perceived to be in the interests of the state it is not permitted. If it occurs nonetheless it is irregular or illegal. The boundaries between legal and illegal migration are generally set by domestic law and by national law enforcement agencies.
2. There have however been some, limited exceptions to the national monopoly over migration regulation. One set of exceptions has been driven by national expediency, when states have recognised the pragmatic advantages of international collaboration. A case in point were multilateral initiatives on the "white slave trade", or sexual trafficking of European women and

girls. This issue was first addressed a hundred years ago<sup>3</sup>, when states devised common measures to fortify their borders against irregular entrants. Considering themselves, rather than the trafficked women, the main victims of this migration, they responded by calling for new international laws (a brief summary follows in the UNCTOC section below) criminalizing the traffickers' conduct and encouraging removal or deportation of the migrants. Thus the emphasis was on repatriation, protection of the state, rather than assistance or protection for the individual migrant.

3. But there has been another exception to the national monopoly over migration control. The second set of international initiatives post-dated the first by about half a century. Interestingly they were also a response to the egregious abuse of non nationals, not the "white slave trade" this time but the holocaust and its terrifying legacy. The new initiatives were motivated by human rights ideals, by concerns over the harm to the migrants, rather than the state. Rather than expediency the goal was protection<sup>4</sup>. In the immediate aftermath of World War Two, there developed the devastating realisation that states could be destroyers rather than protectors of their own nationals, and that people would need to cross international borders, irrespective of permission to do so, to save their lives or escape serious harm. In this context, the international community agreed to create a system of surrogate protection. The 1951 UN Convention on the Status of Refugees was the result of this agreement, an international acknowledgement that despite the sacrosanct nature of state sovereignty, states should have an obligation to assist non nationals forced to flee their home to protect their lives, freedom or fundamental rights. Refugee protection thus created a limited trump to exclusion, an inroad into state control over migration. It also signalled a departure from the earlier international preoccupation with repatriation as the sole response to irregular migrants. It was, and has long remained, one of the most effective human rights measures created by the international community. It was also the precursor of other human rights initiatives related to migration.
4. To be sure the concession was limited. States did not give up their sovereign prerogative to determine who would get refugee status, and they retained their right to refuse this status to anyone. But they did agree that no one seeking protection would be sent back to a state where his or her life or freedom would be threatened, the so-called right to non-refoulement.<sup>5</sup> The protection did not mean that destination states had to grant refugees permanent residence within their own borders. Sending the threatened person to another, safe state, or granting him or her temporary permission to stay in the state until the danger abated would be sufficient. But in practice, the availability of refugee status as a trump to immigration control, became a powerful exception to the general restrictiveness of state migration policy.
5. More recent international collaboration to curb irregular or undocumented migration has continued to include both these two elements of earlier interventions – a punitive, law enforcement aspect focused on the harm to the state caused by unauthorised border crossing, and a human rights enhancing approach focused on the harm or threat to the irregular migrants themselves. In general neither approach has been entirely successful.
6. Harm to states, in the form of escalating numbers of irregular migrants, continues to grow despite stringent border controls. In fact it is clear that immigration restrictionism is a stimulant for growth of irregular migration, and particularly assisted irregular migration or smuggling: the higher the hurdles, the greater the profits to be made. Reliable statistical information on the extent of undocumented migration is elusive,<sup>6</sup> but by all accounts the phenomenon is growing and becoming more lucrative as opportunities for legal migration steadily decrease. According to the UN, approximately 1 in every 5 migrants living in the US and Europe either entered clandestinely or overstayed a visa.<sup>7</sup> And amongst this population, the use of smugglers continues to increase, though most accounts of this are anecdotal. From 1997 to 1999, the number of undocumented immigrants apprehended by the [US] Border Patrol who had used smugglers

[rose] from 9% of all apprehended immigrants to 14%”<sup>8</sup> , an increase of 80% in two years! As the writer Luis Alberto Urrea vividly puts it:

"The border makes number crunchers go mad. It's harder to cross, so there are more Coyotes; the numbers of crossers, in spite of \$5.5 billion spent to stop them, keep swelling; deaths increase; wildlife is endangered; landscape is ruined; and supply and demand rule – Coyotes charge more every year, and because of this, fewer Mexicans are willing to return to Mexico.... They simply can't afford to go home”<sup>9</sup>.

7. But harm to irregular migrants continues to grow too. Very large numbers find themselves in precarious, dangerous or outright exploitative situations, both while they are in transit and once they reach their destinations.<sup>10</sup> Both the failure to effectively enforce migration control at state borders, and the failure to significantly protect vulnerable migrants from gross human rights violations have become major public concerns. Together they contribute to a public image that states have lost control of their borders and of their humanitarian obligations.

# PART ONE

## THE POLITICAL AND ECONOMIC CONTEXT OF HUMAN SMUGGLING

### CONFLICTING POLICY GOALS

8. It is not surprising that states have failed to limit migrant numbers and to curb the flows of and risks to undocumented entrants. The goals of public policy are contradictory and consequently the methods adopted mutually inconsistent and to some extent self-defeating. It is the unregulated nature of much migration today, even more than its scale, that fuels official concern and drives domestic and international policy in different directions. Three distinct positions are identifiable<sup>11</sup>. First, as the migration situation appears increasingly ungovernable, so states' ability to demonstrate to their anxious electorates that they can contain immigration, protect their borders against dangerous or simply undeserving outsiders, and regulate the type of migrant able to work, study or join family in their country, is undermined. The public perception of anarchy predictably leads risk averse politicians to endorse populist exclusionary sentiments and to call for draconian law enforcement responses, modern equivalents of the early anti white slave trade measures. These include a host of domestic militaristic measures, not usually (if ever) routinely targeted at civilians. They also include international initiatives within the context of transnational criminal law, which will be reviewed below.
9. But public attention to undocumented migration is not only driven by a desire to punish and exclude migrants. A second perspective has extensive purchase on public policy. The widespread and publicly visible reintroduction of slavery, be it domestic slavery, agricultural indenture or sexual captivity, at the heart of western economies, precipitates moral indignation and calls for intervention directed at both parties to the migration – criminalisation for the organisers and profiteers responsible, but also protection for the victims exploited and abused. Moreover, the spectacle of dehumanising clandestinity and its lethal consequences – dehydration in the desert,<sup>12</sup> suffocation in cargo crates,<sup>13</sup> dismemberment at unguarded border posts,<sup>14</sup> drowning at sea,<sup>15</sup> freezing in undercarriages of aeroplanes,<sup>16</sup> rape and sexual abuse in transit "safe houses",<sup>17</sup> and the more mundane deprivations of hunger, cold, heat, thirst and fear – also impinge daily on the public imaginary. To quote Urrea again, describing public reaction to the death of 12 smuggled Mexicans trying to enter illegally and whose parched bodies were found in the Arizona desert:

"It was May 31.... Less than two weeks since [the men] had left home... The procession of hearses cut through Tucson, and people saw them off – an outpouring of public grief that startled everyone there. Church leaders and their flocks, Chicanos, Mexican families, college students... Anglos, cops, regular citizens... [One observer said]: "There should be no such thing as an illegal person on this planet"<sup>18</sup>.
10. Like the response to world war two refugees half a century ago, these images elicit calls for a different sort of intervention, an acknowledgement of the migrants' vulnerability and of their entitlement to protection of fundamental human rights, irrespective of legal status. WE will review the range of human rights measures that arise out of this perspective below.
11. There is a variant of the protective response towards irregular migrants, a third stance, based on the image of the migrant as worker rather than defenceless victim. It arises from the common picture of the industrious "illegal", servicing with long hours and low pay the housekeeping and nurturing demands of the affluent middle classes, a worthy and crucial supplement to ageing and demographically declining western democracies. Conditions of employment range from poor to

excruciating, the so-called "3D jobs" (dangerous, dirty, difficult). A recent report by an ILO researcher contains the following description:

"The Local Sanitarian Unit in Tuscany found one Chinese employer who used his leather workshop as a closed dormitory. .... In the words of the workers, 'we work like oxen, eat like pigs and sleep in hens' cages'.<sup>19</sup>

12. This response arises out of a labour rights tradition, an aspect of a broader human rights approach, but one that emphasises the status of the migrant as "worker" rather than merely "human", making a dual contribution through remittances sent back home and labour performed in the destination state. The policy correlate of this approach is the call for amnesty, regularisation of immigration status and more generally "migration management", to redefine the status of irregular migrants and increase legally sanctioned modes of entry for unskilled labour within the white economy. For example, President Bush has discussed development of a temporary Worker Program for people currently in the US without documents, whereby they would pay a one-time fee to get registered, and could renew the license on expiration. Though not officially an "amnesty" (this would too starkly contradict the law enforcement exclusionary program) the program represents a radical transformation of the undocumented population from "illegal" to "worker". There are other examples too. The Australian government has proposed that agricultural workers from the Pacific Islands be granted seasonal work permits<sup>20</sup>; Spain, long the destination of Moroccan and other North African undocumented workers, has also tried, in the words of Foreign Minister Abel Matutes, to "think about how we need to change in a pluralist society where every day we will need more immigrants to take our country forward"<sup>21</sup>. It has instituted three legalisations for irregular migrants, established a rolling amnesty – undocumented workers are eligible for legal residence permits after a minimum of two years work and residence in Spain and it has created a guest worker program for Moroccan seasonal workers. It has also, for some years, been experimenting with a labour quota system, though employers and labour unions concur that the limits are unrealistically low and do more to signal a desire to limit immigration than to reduce the number of irregular entrants.<sup>22</sup>
13. At the heart of these distinct policy goals is the tension between the economic imperative to encourage immigration for commercial and demographic reasons – the irregular migrant as indispensable worker - and the political hostility to migration as a threat to indigenous working terms and conditions, and public services – the undocumented migrant as illegal scrounger. This tension between the inclusionary, expansive needs of modern globalising economies and the exclusionary, nativist impulses of the contemporary political mainstream is evident in the immigration policies and practices of many destination states.<sup>23</sup>

#### **INCLUSIONARY IMPULSES: THE DEMAND FOR IRREGULAR MIGRANT LABOUR – A LOW RISK POLITICAL STRATEGY**

14. Governments continue to promote the benefits, indeed the necessity of globalised economic development. In an increasingly liberalised market economy, competition and the pressure to reduce costs have stimulated interest in sources of low cost labour – either in the developed states or, through the development of call centres, skilled subcontractors and other mechanisms spanning an ever increasing range of tasks, in the developing world and the home states of traditional immigration groups. Demand feeds supply. In developed states the generally small-scale businesses employing irregular workers are run, if not owned, by migrants themselves, typically those who travelled earlier and have made good within the 3 D industries. Family exploitation is commonplace and kinship networks, based on regional or clan association, are a prime engine fuelling recruitment. Many of these businesses are closely intertwined with the mainstream white economy – they are the invisible, black or grey underpinning, the subcontractors that control recruitment and supply the labour intensive products to mainstream

profitable respectable businesses, many of them multinationals and household names. For example, Wal-Mart, the largest and most profitable retail supermarket in the world, has denied knowledge of irregular migrants working under highly exploitative conditions in its shops seven days a week without overtime, but recruited by subcontractors in Eastern Europe.<sup>24</sup>

15. The impact of unskilled migrant workers on developed countries' economies is controversial and unresolved.<sup>25</sup> Do irregular migrants (as so often claimed) take jobs with working conditions that nationals are not willing to accept? Do immigrant recruiters control certain markets and discriminate in favour of their countrymen and women, or, put differently, is being irregular simply a labour qualification for whole areas of work (e.g. of Moroccan workers in Spain who decided to go back to being irregular having been regularised because it was easier to get work.<sup>26</sup> Some studies, like the Center for Immigration Studies' 2001 report on Mexican migrants in the US, claim that unskilled migrants have a negative effect on the receiving state's economy, driving down wages in low-paying job sectors and taking more out of social services than they contribute.<sup>27</sup> Recent research by George Borjas using 30 years of census data in the US shows that a direct correlation between irregular migrant entry into a local labour force and lowering of native wages in the local areas cannot be demonstrated, but that an effect throughout the national economy is discernible<sup>28</sup>. Other studies, including one commissioned by the UK Home Office in advance of its 2002 White Paper, assert that immigration has no adverse effects on wages or employment among the resident population and may even be correlated with wage growth.<sup>29</sup> Similarly, the UN World Economic and Social Survey of 2004 notes that migrants have "only a modest impact" on the wages and employment rates of locals, and some studies suggest that migrant workers contribute more to the receiving state in taxes than they take out in benefits. (Survey overview, page xiii).
16. Whatever the actual economic effects of an influx of unskilled foreign workers, however, public perception is almost unfailingly negative. For this reason, receiving states have tended to open their borders only to the highly skilled. One example is the UK's "Innovator Scheme," which offers visas to foreign entrepreneurs. The German government, too, now offers migration incentives to IT specialists from India. And Article 1, Mode 4 of the WTO General Agreement on Trade and Services (GATS) encourages the temporary movement of skilled service providers as part of a free market global economy. Meanwhile, developed economies in North America<sup>30</sup> and Europe<sup>31</sup> are experiencing shortages not only in skilled workers but in their unskilled and low-skill sectors as well, and these needs remain unaddressed by legal migration schemes. The demand of Europe's ageing population for domestic care providers, or the US's demand for seasonal agricultural labourers, is therefore answered in large part by illegal migration. As the ILO notes, "The recent rise in labour trafficking may basically be attributed the imbalances between labour supply and the availability of legal work in a place where the jobseeker is legally entitled to reside.[. . .] The extent of the flows of irregular workers is a strong indication that the demand for regular migrant workers is not being matched by the supply, with migrants serving as the buffers between political demands and economic realities."<sup>32</sup>

## **EXCLUSIONARY PRESSURES – THE POWER OF XENOPHOBIA AND NATIVISM**

17. So much for the inclusionary impulses of contemporary migration policy. But the exclusionary pressures are equally strong. Over the past two decades, xenophobia has moved from the periphery to centre stage in many developed states. The advent of Le Pen and Haider on the European far right heralded the start of a shift from marginal extremism to mainstream acceptance of xenophobic policies. The benefits of a globalised economy do not appear to have been trickling down to the indigenous working class; on the contrary the latter has seen its livelihood threatened by a race to the bottom in wage rates, and by the export of manufacturing and even service jobs to the more cost-effective developing world. As Kaushik Basu argues

"Globalisation has led to increasing rancour between first and third world labour unions"<sup>33</sup> and more generally between different sections of the labour force. The seeds of resentment, apprehension and suspicion have been sown and are relatively easy to reap. With Pym Fortuyn in the Netherlands the process took on added impetus, pulling in new constituencies around a culturalist, anti Muslim and anti-immigrant platform. Formerly open and liberal states such as Denmark, the Netherlands and Sweden, gradually moved from tolerance to intolerance, from openness to insularity. The marginal and widely discredited racism of the latter part of the twentieth century, of the Ku Klux Klan, the British National Party or the Lega Nord, heir to the racial philosophies of an earlier era in the US South and South Africa, has gradually given way to a new, post 911 racism, which justifies exclusion of migrants on the basis of their alleged threat to liberty (US), their intolerance, illiberalism and religious/cultural conservatism (Europe). According to a recent poll, 44% of Americans believed that Muslim Americans should have their civil liberties curtailed.<sup>34</sup> In November 2004, a few weeks after the murder of Theo Van Gogh, a prominent avant garde Dutch filmmaker a 26-year-old Moroccan/Dutch dual citizen enraged by his portrayal of Islam, a popular Dutch politician Geert Wilders warned of Muslim hostility to core liberal values of sexual and gender freedom. In an interview with the Associated Press, he said: "We are a Dutch democratic society. We have our own norms and values [ . . . ]. If you chose radical Islam you can leave, and if you don't leave voluntarily then we will send you away. This is the only message possible. [ . . . ] If we don't do anything [...] we will lose the country that we have known for centuries. People don't want the Netherlands to be lost, and this is something that I get angry about and I am going to fight for, to keep the country Dutch."<sup>35</sup>

18. The proliferation of human smuggling is a direct and logical outcome of this contradictory political agenda – it produces both desired goals, an uninterrupted supply of low cost and malleable (because vulnerable) labour, and a justification for anti immigration border control measures. As a low risk political strategy, tacit support for human smuggling makes good sense. Other policy options would be less effective<sup>36</sup> – stringent work place inspections, energetic enforcement of employer sanctions, support for trade union demands regarding minimum wages would achieve the exclusionary anti immigrant agenda far better by reducing the demand for irregular migrant workers, but this would prejudice the cheap and flexible labour supply requirements.<sup>37</sup> Conversely expanded visa programs for unskilled workers, more open borders and generous amnesty programs for irregular workers would enhance the supply of unskilled migrant labour but would fall foul of the exclusionary anti-immigrant goal. In other words, to avoid the policy conundrum that states are trapped in, with its perverse effects (migration control feeding smuggling), states would have to grant some lesser rights thereby avoiding infringements of more fundamental rights but jeopardising some constituencies of political support.<sup>38</sup>

## **NON ENTRÉE POLICIES – CREATING BUSINESS FOR THE HUMAN SMUGGLERS**

19. So what means have states used to address this policy conundrum – a pressing need for openness combined with a political mandate to enforce closure? Two strategies are discernible, recalling the policies of an earlier migration control era. The most evident is the ever increasing though selective restrictionism in border immigration control – the politics of non entrée and fortification. But the other strategy is a protective one that recalls the impetus behind the refugee convention and builds on the other two strands of public concern, mentioned above – human rights and labour rights concerns. Each of these strategies produces different policies.
20. States continue to erect increasingly stringent exclusionary mechanisms, both at their borders and well beyond. The familiar tool kit of pervasive visa requirements, carrier sanctions, militarised border controls including sniffer dogs, retinal and other biometric scanning techniques, detention, stringent pre departure checks at departure points, international computerised data storage, analysis and comparison on a hitherto unprecedented scale, and a host of exclusionary

laws and policies continue to complicate the immigration landscape. For example, the UK in 2002 set out an agenda of developing biometric technology, i.e. iris or facial recognition and fingerprints, for use at entry points. It has already begun to use x/gamma ray scanners, thermal imaging and heartbeat detectors and to locate clandestine migrants. The US has militarised its Mexican border, equipping border guards with infrared night-vision goggles.<sup>39</sup>

21. What effect have these exclusionary measures had? While business and affluent travellers, particularly EU nationals, continue to have access to globalised mobility, many other constituencies experience border crossing as a major organisational, financial and emotional challenge. Perhaps those most affected are asylum seekers and refugees who have to rely on presenting their claims at the border to access protection. From a peak in 1992 to the most recent figures of 2002, the numbers of asylum seekers submitting onshore applications in the EU have halved, dropping from approximately 685,000 to 360,000. In the same period, the number of asylum applications submitted in the US and Canada has fallen by a third, from 142,000 to 98,000.<sup>40</sup> The events of 9/11 only aggravated an already complex and oppressive system. Particular groups would be entrants found themselves singled out and targeted for additional scrutiny, or – in the case of overseas refugees from several Islamic states such as Somalia and Sudan – for indefinite delay. In 2002, the US government made 70,000 spots available, but only 27,070 refugees were actually admitted for resettlement. In 2003, the ceiling dropped to 50,000 spots; of these, fewer than 30,000 were filled.<sup>41</sup>
22. But it is not only asylum seekers and refugees who have been caught in the anti-immigrant dragnet. Exclusionary and national security policies affect virtually all types of legal migration, including family reunion, temporary migrations for study, visit, business or work, permanent labour, seasonal workers or refugee migration. In the EU, a new initiative for offshore asylum processing centres, piloted by Italy and Libya, ensures that fewer migrants will be able to reach EU territory to claim asylum there.<sup>42</sup> According to a recent news report about the use of human smuggling as a vehicle for family reunification, the US border patrol captured over 40,000 children being smuggled into the US from Mexico in 2003: "Their number has soared 70% in the past four years.... Parents moved to the United States alone and get settled, then hire smugglers to bring their children across the border".<sup>43</sup>
23. With the possibilities of regular access shrinking, those desperate to flee or migrate have increasingly had to resort to commercial migration assistance – smuggling of one sort or another. Authoritative sources estimate that over 90% of refugees and bona fide asylum seekers make use of such irregular, illegal services to secure the access to protection that international law, and Art 31 of the 1951 Refugee Convention in particular, affords them.<sup>44</sup>

## DESCRIBING HUMAN SMUGGLING

24. What is human smuggling? According to a widely held view it consists of a transnational highly structured and tightly controlled multi-million dollar, mafia like criminal network, transporting in addition to humans, goods such as arms, cultural treasures, body parts and drugs. The following is a typical characterisation: "[The smuggling network] is like a dragon. Although it's a lengthy creature, various organic parts are tightly linked"<sup>45</sup>.
25. Very often the terms "smuggling" and "trafficking" are used interchangeably, to refer to the activity of irregular, commercially assisted border crossing involving some element of human exploitation. In practice the types of "smuggling" vary enormously, spanning a huge spectrum of activities: they include very small scale individual entrepreneurs providing transport across a particular border for a moderate fee, informal groups of agents supplying a range of necessary services (shelter, food, help with the route, means of transport) for a lump sum, more

formalised networks offering a more complex package of necessary products (false documents, coaching with immigration interviews, complex travel arrangements spanning multiple countries, safe houses, links to employers) in return for a hefty down payment and long term instalments payments extracted from slave labour after entry. The picture is a complex and evolving one, reflecting an industry that transforms itself quickly and effectively in response to state intervention.

26. Several typologies for describing and categorising the human smuggling industry have been suggested. For example, Philip's...<sup>46</sup> The Italian research consortium CESPI suggest an interesting classification system. They distinguish on the one hand between agents who service one route versus those who service multiple routes – the specialists vs. the generalists, with the regional, national or continental varieties within this set; and on the other hand they distinguish between those who offer a personalised service (tailor made to an individual or a particular group e.g.) as against those who offer more impersonal services (which can include one or more of the following just smuggling by truck, or just fabrication of false papers, or just coaching for immigration interviews, or just supply of "typical family appearance" e.g. a rented baby, a plausible profile<sup>47</sup>.
27. As with traditional businesses, so in the human smuggling industry, demand and risk affect price.<sup>48</sup> Effective immigration control increases the demand but also the cost. According to one study, the price that "snakehead" smugglers charge to bring migrants from China's Fujian province into the US has doubled—from \$28,000 in the early 1990s to about \$60,000 in 2001.<sup>49</sup> Similarly, since September 11 and the resulting tightening of the US border, the price Mexican migrants pay to "coyotes" to take them across the border into Arizona has reportedly tripled to more than \$1,500.<sup>50</sup> In a predictable and familiar economic scenario, the market value of the migration professional's services climbs up as these services become more and more complex, dangerous and essential. This process produces a situation in which, by some estimates, commercial migration assistance to secure undocumented or illegal entry generates up to \$10 billion a year worldwide.<sup>51</sup> Here we have a highly differentiated but profitable business directly fuelled by government policies, and one that yields substantial material rewards - a classic growth industry in other words.<sup>52</sup>
28. States have responded to this flourishing industry with an increasing sense of urgency. Recognising the inadequacy of many of the domestic immigration control measures mentioned, they have embarked on an ambitious international program of transnational law enforcement. This new program supplements and complements an already existing body of international law relevant to migration.

## **PART TWO**

### **THE PROTECTIONS AVAILABLE TO SMUGGLED MIGRANTS UNDER INTERNATIONAL LAW.<sup>53</sup>**

#### **INCLUSIONARY PRESSURES AND THE PROTECTIVE STRATEGY – INTERNATIONAL HUMAN RIGHTS LAW AND MIGRATION**

29. Migration is an inherently risky activity. Despite the potential rewards and benefits, switching the familiar for the new, and the status of a national for that of a non-national or alien in a world in which the state is still the prime guarantor of rights entails material, social and psychological challenges. When these challenges are compounded by the insecurities and vulnerabilities associated with illegality, as is the case for undocumented migrants, the risks increase. The more politically salient immigration control is, the more costly illegal entry and residence become. And when alienage and illegality include the additional costs associated with smuggling – fear, dependence, violence, forced labour, burdensome debt – migrant vulnerability increases. As Hannah Arendt put it, with the situation of refugees in mind:

“The calamity of the rightless is not that they are deprived of life, liberty and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them.<sup>54</sup>”

30. Refugees are no longer in the "rightless" position they were in when Arendt was writing in the 1940s and early 50s. As indicated above, the Refugee Convention requires states parties to accord them a wide range of protections once their status as refugees is confirmed. In the absence of comparable political pressures to those exerted on behalf of refugees after the horrors of World War 2, undocumented migrants have received far less protective attention. Having neither legal immigration status nor citizenship in the country of their residence, they often remain below the radar of national law. Meanwhile, the protections of international law may lie dormant unless triggered by certain contingencies – an asylum claim, a challenge to expulsion because of fear of torture. Otherwise, there appear to be very few legal instruments – and certainly no unified, coherent body of law – that offer unequivocal protection for the rights and freedoms of the undocumented.

31. The protections that do exist under existing international law fall into three major spheres: human rights law, labour law, and criminal law. The most recent international developments specifically addressing the issue of human smuggling incorporate some and contradict others of these international protections. After briefly reviewing the three areas of relevant international law, we will consider the recent UNCTOC, its two migration protocols, and the compatibility of these recent measures with existing international law. We will continue by considering some of the conceptual gaps and challenges. We will conclude by outlining elements of an alternative and more effective policy approach to human smuggling grounded in and respectful of the human rights of migrants.

#### **THE INTERNATIONAL BILL OF RIGHTS AND THE PROTECTION OF MIGRANTS**

32. There is no single human rights document that deals comprehensively with the rights of non-nationals. Nor is there an authoritative definition of a "migrant" in international law.<sup>55</sup> This is not an oversight but rather a conscious decision by the international community: in 1985 the UN General Assembly drafted a Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, an attempt to consolidate and codify the existing

human rights norms applicable to migrants. States' fears that this might erode their sovereign prerogatives to favour nationals, however, made the resulting declaration weak and limited, and ultimately relegated it to obscurity.<sup>56</sup> As a result, the minimum floor of rights to which migrants, including undocumented migrants, are entitled derives from implicit and explicit protections contained in a range of other international human rights treaties instruments, like the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

33. While the UDHR includes no specific references to migrants or aliens, its use of inclusive language (*i.e.* its use of pronouns like "everyone" and "no one") implies that its provisions must apply to all persons, regardless of their circumstances.<sup>57</sup> SO, for example, the "right to life, liberty and security of person" (art.3), the right to "recognition everywhere as a person before the law (art. 6), the prohibition on "arbitrary arrest, detention or exile" (art 9) or on being subjected to "arbitrary interference with his privacy, family, home or correspondance" (art. 12) apply to all.<sup>58</sup>
34. Similarly, the ICCPR does not refer directly to migrants, but its language again suggests that it covers individuals of all categories of citizenship and immigration status. Thus, for example, Article 2(1) states: "Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*"<sup>59</sup>. However, while the Covenant does apply to migrants as well as to nationals, it does not necessarily apply identically in all cases. Naturally, Article 25 (the right to vote) applies only to citizens, while Article 13 (the right to judicial review of an expulsion order) applies only to non-nationals. Moreover the ICCPR draws a secondary distinction between legal and undocumented migrants: Articles 12 (the right to freedom of movement and choice of residence) and 13 (expulsion) "only protect those aliens who are lawfully in the territory of a State party. [...] [I]legal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions."<sup>60</sup>
35. Thus, differential treatment is permissible. When an individual's claim to a particular right conflicts with the state's own interests, the state may take into consideration that individual's citizenship or immigration status in deciding the matter. Indeed the state may lawfully deprive non-nationals of certain rights ("derogation") even while it upholds the same rights for nationals. And it may deprive undocumented aliens of certain rights even while affording those rights to legally resident aliens. But the state must act reasonably, not arbitrarily. Under international law it is expected to use a "balancing" rationale to reconcile, for example, the migrant's right to a family life that is free from "arbitrary and unlawful interference" (Article 23) against the state's right to deport non-nationals, or the migrant's right to be free from arbitrary arrest and detention (Article 9) against the state's right to detain illegal entrants.<sup>61</sup> Much state practice post 9/11 has flouted these international rules, as both the UK and US top courts have recently ruled.
36. Since non-discrimination is so central to the concept of fairness on which international human rights law is based, the scope for differential treatment is carefully circumscribed. Any selective derogations made on the basis of citizenship or immigration status must not be "unproportional, arbitrary or discriminatory" – an element of fairness and reasonableness is essential to bring the measures within the bounds of international law. This even applies during times of emergency. ICCPR Articles 4 and 12(3) set out strict conditions for derogations during states of emergency.<sup>62</sup> The Human Rights Committee's General Comment 18 on "Non-Discrimination" (1989) clarifies that "differential treatment is permissible where the distinction is made pursuant to a legitimate aim, the distinction has an objective justification, and reasonable proportionality exists between the means employed and the aims sought."<sup>63</sup> Some fundamental civil and political rights such as

the rights to life, freedom from torture, freedom from slavery and forced labour, and equality before the courts and equal protection of the law are never derogable, even for non-nationals and the undocumented, because differential treatment based on those grounds could never be defensible. Other rights, however, such as the right to free movement within the state, may be subject to limitations for non-nationals for national security reasons.<sup>64</sup> The bottom line here is that, although the ICCPR may be applied differently to migrants, this is not the same as saying that it does not apply at all. States can only deny rights to non-nationals when this is defensible within legal limits. The default position is therefore an obligation to grant rights protection on a par with nationals, not the opposite.

37. It is not just civil and political rights protections that apply to migrants, including undocumented ones. The social and economic rights that international law calls for also apply. The main instrument dealing with these rights, the social and economic rights covenant (known as the ICESCR) applies to, theoretically extends to migrants (as it does to all persons) wide-ranging entitlements in key areas of vulnerability like fair wages, health care, and education. In practice however these protections have proved markedly weaker than the civil and political protections contained in the ICCPR.<sup>65</sup> Article 4, for example, allows states to limit the economic and social rights of non-nationals in cases where that is demanded by the “general welfare”<sup>66</sup> – a clause vague enough to allow for wide interpretation. This may temper the ICESCR’s practical applicability to migrants.

#### **OTHER HUMAN RIGHTS INSTRUMENTS – THE PROTECTION OF MINORITY INTERESTS (RACE, GENDER, CHILDHOOD)**

38. In addition to the protections derived from the Bill of Rights (i.e. the UDHR, ICCPR, and ICESCR) migrants also enjoy the implicit protection of several other universal human rights instruments, which can be cited and invoked in particular instances to strengthen migrants' bargaining position vis à vis exclusionary state practice. Relevant instruments include the Convention on the Elimination of all forms of Racial Discrimination (CERD, 1965), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), and the Convention on the Rights of the Child (CRC, 1989). Similar guidelines of proportionality apply here.
39. While the text of CERD does not mention migrants, its applicability to this particular group of people has been the subject of some high-level attention in recent years, sparked by the rise in xenophobic hate-crimes against migrants in Western states. The final declaration emanating from a 2001 UN World Conference on Racism, noted that “xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism.”<sup>67</sup> In 2004, the, the UN Committee that oversees implementation of CERD, observed that xenophobia provides the impetus for many of the human rights violations migrants suffer and specifically called on states to prevent and redress instances of discrimination against non-nationals in such areas as labour rights violations, debt bondage and illegal confinement, rape and physical assault, and unfair access to housing, health care, and education.<sup>68</sup>
40. CEDAW is also an important source of protections, since migrant women, particularly undocumented domestics working within the seclusion of private homes, are especially vulnerable to gender-based human rights violations. Supposedly "supportive" family networks frequently degenerate into exploitative, even abusive structures that cynically manipulate the multiple disempowerment (legal, economic, gendered) of undocumented migrant women workers. And the preferred feminist remedies of recourse to public sphere protections, including law enforcement and welfare support, are unavailable to irregular migrants without "papers", a classic case of double jeopardy<sup>69</sup>. Like the other human rights treaties referred to, CEDAW is

silent about the rights of “migrants” as such. However, Article 6 does call on states to “suppress all forms of traffic in women and exploitation of prostitution of women.”<sup>70</sup> The trafficking and exploitation of migrant women received further attention at the Fourth World Conference on Women (1995) and in the resulting Beijing Platform for Action. Whereas the report of the previous World Conference on Women (1985) solely addressed traffic in women for prostitution, the Beijing Platform for Action incorporates forced labour into the definition as well.

41. International law has recognised the distinctive needs of some groups of child migrants, including in particular refugee children and exploited children, for close to a century, since 1924<sup>71</sup>. The Children's Rights Convention, which defines a child as "every human being below the age of 18"<sup>72</sup> brings together previous provisions in a comprehensive series of protections, many of which are relevant to the situation of migrant children. It is the most comprehensively ratified international human rights instrument. Only the United States and Somalia have so far failed to ratify the treaty. All other states are bound by its provisions. The overarching principles of the CRC, which apply to all children irrespective of status, are two: that the "best interests of the child shall be a primary consideration" in all actions concerning children (art.3(1)); and that "a child who is capable of forming his or her views [should have] the right to express those views freely in all matters affecting the child" (art 12 (1)). These principles have important implications for undocumented children<sup>73</sup>, essentially requiring states to treat them as children first, akin to domestic children, and undocumented migrants second. Punitive questioning or expedited deportation of smuggled children would violate these provisions. Other more general protections in the CRC include the right of every child to acquire a nationality (art.7), the right of every child, irrespective of status, to free primary education (art 28(1) and the prohibition of discrimination against children based on their parents' "status"— including immigration status, implicitly, a protection which may be construed as a protection against the deportation of migrants in cases where family unity is at stake (art 2(2)). Indeed the protection of family unity is a key element in the convention. In mandatory language art 9(1) states: "States parties **shall ensure** that a child **shall** not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is **necessary for the best interests of the child**". This rule applies to ALL children within a State party, including undocumented migrants and children of undocumented migrants. The CRC also makes it clear that detention of children should only be used "as a measure of last resort and for the shortest possible period of time", (art 37(b)).<sup>74</sup> UNHCR has stated that separated children seeking asylum alone should never be detained. In practice these provisions are routinely ignored by several destination states, including the US and Australia, who detain smuggled children —often at length and in very harsh circumstances — following detection.<sup>75</sup>

## HUMAN RIGHTS PROVISIONS PARTICULARLY RELEVANT TO SMUGGLED MIGRANTS

42. Several human rights instruments address migrant experience more directly. Reference has already been made to the 1951 Convention on the Status of Refugees, for example, which is triggered the moment a migrant claims asylum in a receiving state. Under the Convention, the ability of states to draw distinctions among migrants on the basis of their immigration status is more tightly circumscribed than in any of the above human rights treaties. Article 31(1) states that the fact of a migrant's lack of documents, illegal entry, or unauthorised residence in the receiving state cannot negatively influence the migrant's claim to asylum:

The Contracting States shall not impose penalties, **on account of their illegal entry or presence**, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

43. In fact states do routinely accord different treatment to undocumented asylum seekers who have arrived in the receiving state by way of another state (a "third" or transit) state or who delayed in presenting their asylum applications to the appropriate authorities. These measures are justified as purely administrative rather than penal, in that they do not deprive asylum seekers of access to an asylum determination process, but rather require them to present their asylum application in the first safe state entered. This state practice is legitimated by explicit agreements within the European Union's harmonised asylum policy, as well as by the US-Canada Safe Third Country Agreement.
44. Article 33, which prohibits *refoulement* to torture or ill treatment, applies to **all** persons who qualify as refugees under Article 1(A), including those who would be eligible for refugee status, but who have not yet received a positive status determination<sup>76</sup>. This is the situation of a large number of smuggled undocumented migrants, ignorant or fearful of the practicalities of seeking refugee status. The Convention against Torture (Article 3) and the ECHR (Article 3) provide even more far-reaching protections against *refoulement*, since neither treaty restricts the protection to those who fall within the Refugee Convention definition. Rather it is enough that the individual fears ill treatment in his or her home country. And these protections are "non derogable" – in other words states cannot use national security or other public policy arguments to qualify the protection, it is absolute irrespective of circumstances. So a person who has been smuggled and faces serious threats (e.g. because of unmet smuggling debts) falls within these provisions, even if he or she might be considered "unworthy" or "suspect" on public policy or national security grounds.
45. Various human rights instruments' contain prohibitions on forced labour which are pertinent to migrants. They include ECHR Article 4 and the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956). More recently, article 7 of the Rome Statute denounced "enslavement" (including trafficking for such purposes) as a crime against humanity. None of these anti-slavery instruments use the word "migrants," but because migrants – especially those without documents – are particularly vulnerable to slavery, forced labour, and servitude, these provisions are highly relevant to any discussion of migrants' rights.<sup>77</sup>

## HUMAN RIGHTS PROVISIONS EXPLICITLY FOR MIGRANTS

46. Because of the growing salience of migration described above, there has been an increase in *explicitly* migrant-focused international legal activity, including, most significantly, the 1990 Convention on the Protection of the Rights of All Migrant Workers and Their Families. This treaty represents the most comprehensive legislative attempt to date to address the vulnerabilities of migrants in a human rights framework. It deals first and foremost with the working conditions and labour rights of migrants, but it also contains extensive civil, political, economic, and social provisions which extend rights both to migrant workers and their families. One of the most important and remarkable achievements of the Migrant Workers Convention is the explicit inclusion of irregular or undocumented migrant workers within its scope, a departure from previous international legal provisions. Although the Convention does reserve certain rights for legal workers only (such as the right to form trade unions, or the right to treatment on par with nationals in terms of housing and social services), it also sets out a list of fundamental rights that must be accorded to all migrant workers, regardless of the legality or illegality of their residence. These rights apply equally to those who entered legally but overstayed their visas, and to those who entered the country clandestinely. For example, "**No migrant worker** or member of his or her family shall be held in slavery or servitude. No migrant worker or member of his or her family shall be required to perform forced to compulsory labour". (Art 11 (1), (2)). Other

provisions prohibit interference with religious freedom or expression, with privacy or respect for the family.

47. The UN system's growing attention to migrants as rights-holders is also evidenced by the establishment, since 1990, of Special Rapporteurships on the Sale of Children, Child Prostitution and Child Pornography, on Violence against Women, and most recently on Trafficking in Persons. All these posts provide "focal points" for clarifying the rights of non-nationals, both documented and undocumented and for developing policies to curb abuse.<sup>78</sup> Of these, the Special Rapporteur on Violence against Women, Radhika Coomaraswamy, has been the most actively engaged in generating dialogue about the rights of smuggled and undocumented migrants. The Commission on Human Rights has also appointed a Special Rapporteur on the Rights of Migrant Workers, Gabriela Rodríguez Pizarro. Pizarro's post was established in 1999, partly in reaction to the rise in xenophobic attacks on non-nationals, and her mandate explicitly includes those most vulnerable to such discrimination: "migrants who are non-documented or in an irregular situation."<sup>79</sup>

#### **LABOUR RIGHTS LAW<sup>80</sup>**

48. An alternative framework for protecting the rights of smuggled workers is labour rights law. The International Labour Organization (ILO) has been at the forefront of labour rights legislation and standard setting for nearly a century, and several of its conventions are especially relevant to such migrants. Though individuals cannot take cases to court to enforce their rights under ILO conventions as they can with some of the human rights instruments, the acknowledgement of universal minimum standards relating to work establishes an important framework for rights enforcement. Like the human rights provisions discussed above, most of the ILO's conventions deal with migrants incidentally, or only insofar as migrants find themselves in particular exploitative situations or belong to specific groups (e.g. children).
49. First, ILO legislation is applicable in cases where migrants are subjected to forced labour. The 1930 Convention on Forced Labour (C 29) and the 1957 Abolition of Forced Labour Convention (C 105) call on states to suppress such practices. Forced or compulsory labour is defined as "all work or service which is exacted from any person under the menace of any penalty, and for which the said person has not offered himself voluntarily". As will be discussed below, many smuggled workers would fit this definition – whether or not they have "offered [themselves] up voluntarily" may be less relevant or revealing than consideration of their particular vulnerability as undocumented migrants<sup>81</sup>. These Conventions are not protection instruments, and the type of forced labour they envision is that which is performed in the service of the state, not in the service of private employers. Nevertheless, they "reflect a general consensus that forced labour and other slavery-like practices should be abolished."<sup>82</sup> This consensus is also demonstrated by the 1998 [ILO Declaration on Fundamental Principles and Rights at Work](#), which makes compliance with certain core labour rights, including the right to freedom of association, to collective bargaining, to the elimination of forced or compulsory labour, to discrimination in employment and occupation, and a general prohibition on slavery, obligatory for all ILO member states.
50. The ILO has also generated legislation on child labour: the 1973 Minimum Age Convention (C 138) and the 1999 Convention on the Worst Forms of Child Labour (C 182). The latter extends beyond traditional labour law boundaries to include prostitution of trafficked children - until recently considered to be a question purely of human rights. In general, these documents treat migrant children and national children together as victims of the larger problem of child labour exploitation, rather than differentiating between them, as human rights law does, on the basis of their national origin or immigration status. Their immigration status is only considered relevant

insofar as it influences access to remedies. This is an approach which is consistent with the human rights principles underlying the Convention on the Rights of the Child (see above) and which should govern state approaches to migrant child labour exploitation.

51. Finally, there are the ILO Conventions that deal directly with migrant workers: the 1949 Convention on Migration for Employment (C 97), and the 1975 Migrant Workers (Supplementary Provisions) Convention (C 143). Convention 97 is concerned only with the labour rights of legally resident migrants (the rights to social security, fair remuneration and overtime pay, membership in trade unions, and so forth). Convention 143, however, calls on ratifying states to “protect the basic human rights of *all* migrant workers” (Article 1), and subsequent ILO commentaries have confirmed that this does indeed include even those in an irregular situation.<sup>83</sup> After acknowledging all migrants’ entitlement to basic human rights, Convention 143 goes on to enumerate three categories of workers’ rights: some of which are limited to those migrants who have entered legally, others of which are extended to migrants who entered legally but are now irregular (*i.e.* those who have lost the jobs for which they were originally admitted), and a small number of which are accorded to *all* migrants, even those who entered clandestinely (such as the right to access a competent body in case of a dispute over labour rights, and the right not to bear the cost of travel if expelled).<sup>84</sup>
52. Like other ILO norms, Convention 143 is not primarily a protection instrument. Instead, its main aim is to “suppress” clandestine labour migration and to encourage states to take action against its organisers. Moreover, individuals cannot bring complaints about violations of its provisions before the ILO. However, the ILO does conceive of labour rights as being inextricably linked to human rights and the organisation certainly seems to be moving towards a greater engagement with migrants’ rights broadly conceived, as evidenced by the International Labor Conference’s 2004 report, entitled *Towards a Fair Deal for Migrant Workers in the Global Economy*, and other official statements. Likewise, the UN system acknowledges the salience of labour rights to human rights protection (for example, the SR on migrants’ rights has repeatedly advocated closer co-operation between her office and the ILO). In practice the institutional and legislative separation between UN bodies focused on human rights and labour rights has tended to militate against effective enforcement of migrant workers rights. The implementation strategies that pertain to the human rights sphere (reporting obligations, test case litigation) do not apply to the tripartite (employer, worker, government) labour rights sector which decreases the practical impact of many ILO norms. Conversely, however, the inclusive and destigmatising focus of the ILO approach to standard setting with its emphasis on workers’ actual situations rather than on individual moral responsibility for their situation or their immigration or citizenship status has not sufficiently impacted on human rights law.<sup>85</sup>

#### **BALANCING EXCLUSIONARY PRESSURES WITH RIGHTS CONCERNS: THE RELEVANCE OF CRIMINAL LAW TO SMUGGLED MIGRANTS**

53. The third, and ever dominant, international legal approach to irregular migration, stemming from the exclusionary and security concerns detailed above is criminal law. This perspective dates back to the earliest law enforcement measures relating to the white slave trade and continues to be the context within which states have been least reluctant to relinquish sovereign control over their own migration policy because, unlike human rights and labour law, criminal law enforcement does not require states to assume substantial protective responsibilities for non nationals.
54. The body of international criminal law does impose some minimal responsibilities on states toward non-nationals on their soil – for example, witnesses’ and victims’ protection laws like the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the EU Council Framework Decision on the Standing of Victims in Criminal Proceedings

(2001), both of which oblige the state to give crime victims access to the proceedings against their offenders, and to make translation, legal, and social services available to the victims during those proceedings. This includes all victims of crimes, non-nationals and nationals alike. The UN Declaration prohibits discrimination or the denial of access on the basis of nationality (Article 3), and the EU Framework Decision states explicitly that its provisions apply to non-nationals regardless of their legal status in the country in which the crime was committed (Article 7). Detention and deportation of non nationals preventing access to proceedings against their offenders would violate these provisions. Some imaginative measures for protecting witnesses and victims to encourage them to participate in the prosecution of their violators have come from the newly established international criminal court and the two transitional justice measures created in Sierra Leone. These measures emphasise the importance of creating a safe and enabling environment, and even establishing specialist hearings focused on claims by particularly vulnerable witnesses. Following these examples might benefit smuggled and trafficked persons seeking redress within national court systems.

55. On the whole, however, criminal law foresees few protections for migrants. Most international criminal law measures attempt to address irregular migration by strengthening border controls and criminalizing the facilitators. They are mainly concerned with prevention and interception – focusing on the two moments of initiating the journey and crossing the border – and leave the rest (i.e. ill treatment in the country of destination) to national criminal law, or to human rights or labour norms.
56. Outside the UN framework, too, legislative activity surrounding irregular migration has occurred mainly in the law-enforcement sphere. Commercially assisted undocumented migration has been criminalised by a range of EU instruments: the 1985 and 1990 Schengen Agreements initiated this process by first treating migration issues as a law enforcement rather than a humanitarian or social welfare issue context and criminalising the facilitation of illegal migration for financial gain (Article 27); the 1992 Maastricht Treaty declared “unauthorized immigration” an area of common interest among member states, along with organised crime and drug trafficking (Article K.1); and, building on this approach the 1999 Amsterdam treaty allowed for closer police and judicial co-operation among member states to facilitate the pursuit and prosecution of smugglers.
57. In sum the law enforcement approach presupposes that exclusion of migrants rather than legalisation of their presence is the solution to the harm done by irregular migration. This perspective does not directly contradict the emphasis of the previous two approaches because there is some space for human rights protections and labour rights enforcement within the law enforcement approach – witness protection schemes, non discrimination in access to court proceedings, prohibition of forced labour or slavery like practices. But the emphasis, on exclusion rather than inclusion of migrants, and on protection of state boundaries rather than on individual rights does indirectly increase the risk of a range of infringements of individual rights – of the right to family life of irregular migrants for whom travel across the border is increasingly difficult, of the curtailment of civil and political rights as a result of illegality and the dangers it brings, and – in extreme cases – of the right to life as border crossing becomes a life threatening activity

#### **HOW DO THE DIFFERENT INTERNATIONAL LAW FRAMEWORKS RELATE IF AT ALL?**

58. In her first report to the Commission as the Special Rapporteur on the Rights of Migrant Workers, Pizarro observes that no single, comprehensive definition of a migrant exists in international law.<sup>86</sup> Only partial definitions exist. The term “migrant worker” (as in ILO Conventions) does not apply to all migrants, some of whom do not move to work (i.e. children moving to join parents). Likewise, CEDAW and CRC highlight the vulnerability of women and

children to gender-based rights violations, but a smuggling policy based on them alone may address only some aspects of the phenomenon (i.e. exploitative prostitution) while overlooking other aspects (i.e. exploitative labour) and will leave adult males out of the equation entirely. The 1990 Migrant Workers Convention is the only international instrument so far to deal with the rights not just of migrant workers but also their families, regardless of their family members' age, gender, or employment status. This is an important step forward, but there still is no single, authoritative definition of a migrant in international law. International law provides spotty coverage of migrants' rights, and one must look to many different legal instruments to patch together a full picture of which rights are protected and which are not.

59. Generally, human rights law is concerned primarily with need, secondarily with status, and not at all with motive. On this point, the 1951 Refugee Convention is illuminating by analogy. In order to be a refugee as defined by the Convention, an individual need not have fled her country because of the persecution she now fears; it is enough that she fears it *now*, and therefore cannot return. Typically of human rights instruments, the Refugee Convention is written in the present tense.<sup>87</sup> The original motives behind an asylum seeker's flight are not a critical consideration in determining her eligibility for refugee status, and according to Article 31 the means she used to travel, whether legal or illegal, are completely immaterial. Similarly, when Special Rapporteur Pizarro proposed her own definition of "migrant" in her 2000 report to the Human Rights Commission, she took into consideration only the individual's *current* status in the receiving country – not how he or she got there. Pizarro notes that "definitions that are related to the reasons why people leave their countries of origin are perhaps the least suitable kind of definition. [...] In order to give a definition of a migrant that is based on human rights, the first and most important step is to see whether or not the rights of those persons enjoy some form of legal, social and political protection."<sup>88</sup> When assessing the human rights needs of migrants, the relevant question is whether the conditions in the present, in the country of destination, are rights-violative.
60. Labour rights law is similar to human rights law in that it is concerned not with motives or reasons for a migrant's transport, but rather with the conditions in the individual's present place of work. In contrast, however, criminal law demands attention to motive. So we have a real conceptual divergence here between HR and LR on the one hand and CL on the other...
61. There is also the problem of too little co-operation among these three spheres of legislative activity. Advocates of a human rights approach may refuse to consider the applicability of labour standards because that would entail acknowledging voluntary prostitution as a legitimate (and thus regulate-able) form of work; advocates of a criminal law approach may eschew human rights provisions because, rather than strengthening the state's capacity to seal up its borders, they would impose obligations on the state toward non-nationals. So we end up with little islands of status-specific or situation-specific protections under these three bodies of law, which don't speak to one another...

## PART THREE

# BRINGING PROTECTIVE AND ENFORCEMENT APPROACHES TOGETHER? THE UN TRANSNATIONAL ORGANIZED CRIME CONVENTION AND ITS 2 MIGRATION PROTOCOLS ON HUMAN RIGHTS TRAFFICKING AND SMUGGLING

### HISTORICAL AND LEGISLATIVE BACKGROUND TO THE UNTOC.<sup>89</sup>

62. The earliest international legislation to directly address the facilitation of irregular migration appeared in the early 20<sup>th</sup> century, when stories began to circulate about European women and girls being kidnapped or enticed to foreign countries for “immoral purposes.” While instances of such trafficking were in fact probably rare, the stories so aroused popular concern that a series of international agreements were drafted to facilitate the interception and swift repatriation of these women. The first pieces of international legislation – the International Agreement for the Suppression of the White Slave Traffic, and the International Convention of the same name – appeared in 1904 and 1910. Then, in 1921 and 1933, the League of Nations passed two more conventions on trafficking, and in 1949 the United Nations consolidated all this previous legislation into the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. As law-enforcement instruments they were largely toothless, but they laid the conceptual foundations that were to guide national and international trafficking policy for the next three quarters of a century.
63. Common to all these instruments is a **preoccupation with the initial reasons for transport rather than with the present needs of the transportees**. All five legal instruments only address trafficking for the purposes of prostitution, not for forced labour or other, similarly rights-violative conditions of servitude. And, except for the 1949 Convention, they restrict their focus to women and girls, despite the fact that men and boys may also be trafficked and face similar deprivations of liberty. Indeed the separation between anti slavery and anti sexual trafficking initiatives is remarkable, reflecting a pervasive disjuncture between attitudes to sexual exploitation (which produce indignant outrage) and labour exploitation (much more acceptable) still evident today.<sup>90</sup> Furthermore, the few rights provisions in the laws are vague and peripheral, and tend to be optional rather than obligatory on states.<sup>91</sup> The drafters failed to see beyond the typology of the “pure, innocent” female-victim or to recognise trafficked migrants as agents with legitimate claims on human rights.<sup>92</sup>
64. The first four treaties are primarily concerned with identifying and criminalizing the traffickers rather than with protecting the trafficked migrants. Because the retention of a woman in a brothel and the conditions of her work there were considered in the early 20<sup>th</sup> century to be questions of domestic law, drafting an international legal treaty regulating them was deemed an unacceptable intrusion on state sovereignty. This abstentionism about prostitution is still the prevailing approach of international law.
65. The only aspects of the “white slave trade” which international law was equipped to address, the drafters believed, were the act of recruitment and the crossing of the border.<sup>93</sup> For this reason, the early laws criminalising trafficking paid no attention to the attitudes or intentions of the women themselves or to their circumstances on arrival in the destination country. Instead the legislation focused on the plans and recruiting methods of the traffickers at the inception of the journey. Prostitution and “the accompanying evil of the traffic in persons” were considered to be “incompatible with the dignity and worth of the human person,” and therefore were conditions to which no one could genuinely give her consent. Therefore, in order to prove that a case of

commercially assisted migration amounted to trafficking, states had to ascertain the motives of the trafficker at the start of the journey, not the motives of the trafficked migrant or the conditions in which she was subsequently held.<sup>94</sup>

## DEVELOPMENT OF THE UN CTOC

66. Such was the international legal framework addressing assisted undocumented migration until the latter part of the 20th century, when feminism and the modern human rights movement demanded a reconsideration of the trafficking issue. But as commercialised undocumented migration became a contemporary concern of states – and as it became clear that trafficking flows were not leading *out of* but *into* the developed world – so the emphasis shifted and immigration control, exclusion and border security concerns came to predominate. Modern legislative initiatives on assisted undocumented migration, much like their early twentieth-century predecessors, show a preoccupation with the reasons for transport and the motives behind the migration in the first place. The critical difference is that in contemporary legislation, the motives under consideration are not only those of the smuggler-trafficker, but also those of the migrant him or herself. This scrutiny of the migrant's motives at the start of travel – and the continuing relative inattention to his or her present situation and needs – enables states to attribute either innocence or guilt to undocumented migrants, and to ignore their protection needs, even expel them if they are found undeserving.
67. As far back as 1993, the General Assembly of the UN had passed a resolution calling for international co-operation to address the problem of human smuggling<sup>95</sup>. Though there was acknowledgement of a human rights aspect to the problem, the main emphasis of the resolution was on criminal justice. There followed a series of initiatives, culminating in an Austrian draft convention aimed at establishing human smuggling as a "transnational crime"<sup>96</sup> – Austria having become a major transit route from the Balkans and East Europe to Germany and the EU. The draft was considered by a series of working groups over several years. At about the same time, in October 1997, in a parallel but unrelated initiative, the Legal Committee of the International Maritime Organization (IMO) received a draft from the Italian delegation – Albanian crossings of the Tyrrhenian Sea having escalated dramatically over the same period - for a Multilateral Convention to Combat Illegal Migration by Sea. This draft convention also wanted to make the exploitation of illegal migration an international offence.<sup>97</sup> However delegates were concerned that the IMO (which deals mainly with maritime safety) was an inappropriate venue for an instrument that seemed better suited to criminal law, and eventually the Italian proposal was shelved.<sup>98</sup> But similar discussions were under way under the auspices of the UN Commission on Crime Prevention and Criminal Justice, and in 1998 the Commission submitted a report to the General Assembly outlining a preliminary strategy for such an instrument, within the framework of transnational organised crime.

## THE DRAFTING HISTORY AND EVOLUTION OF 2 SEPARATE MIGRATION PROTOCOLS: FROM CONCEPTUAL BLURRING TO VICTIM/AGENT DISTINCTION

68. From the outset the strategy called for two separate instruments on irregular migration, one on "trafficking" and one on "smuggling". But this apparently clear programmatic agenda belied considerable conceptual blurring between the two activities, reflecting a confused and complex reality as much as, or perhaps even more than, a lack of intellectual acuity. Thus the draft resolution on smuggling from the UN Commission on Crime Prevention and Criminal Justice (CPCJ) notes that "women and children are particularly vulnerable to becoming **victims** of the crime of illegal trafficking in and transporting of migrants"<sup>99</sup> – the topic is smuggling, the term trafficking. And the language of victimhood and vulnerability of women and children, the focus

on harm to individuals not just to the state, suggests an early recognition that like trafficking, human smuggling can give rise to major human rights risks, whatever the initial intentions or desires of the migrant.

69. At the time of the first session of the Ad Hoc Committee charged with drafting the new convention, the distinction between the trafficking and the smuggling protocols was as follows: smuggling covered "illegal trafficking and transport of migrants"; trafficking covered "trafficking in women and children" – hardly a clear dichotomy! It was not until the 4th session of the drafting committee that the term "smuggling" was actually introduced, probably to differentiate more clearly between the protocols, particularly as the draft trafficking protocol by this stage included men as well as women and children within its remit (albeit it as a secondary priority – a shift from "trafficking in women and children" to "trafficking, especially in women and children").
70. Austria and Italy jointly submitted the first draft of what would eventually become the smuggling protocol. It illustrates well the confusion and inconsistency underlying the international community's approach to human smuggling to this day. The preamble to the first draft states: "the illegal trafficking and transport of migrants is a particularly heinous form of transnational **exploitation** of individuals in distress"; it also mentions exploitation of prostitution and notes that "an increasing number of migrants are being smuggled for purposes of prostitution and **sexual exploitation**". But as UNHCHR points out the body of the protocol does not follow up on the concern with exploitation or vulnerability<sup>100</sup>. The definition of smuggling proposed does not address the migrant's experience at all and is instead focused exclusively on the smuggler (see below for more detailed discussion of the definition of smuggling).
71. Over the 11 sessions of the Ad Hoc drafting committee, several knotty conceptual difficulties with the smuggling protocol surfaced. First, the extent to which exploitation was an aspect of the ongoing situation of smuggled migrants proved contentious. References to vulnerability and sexual exploitation of migrants were gradually replaced by a more generic emphasis on the need to guarantee humane treatment and basic rights. The drafting process mirrored this: protection of migrants rights moved from being a key purpose of the protocol to being a subsidiary aspect of the border control goal.
72. Second, despite the desirability of separating out trafficking and smuggling in the legislative instruments, the difficulty of telling them apart "on the ground" was noted, a particularly troublesome issue given that the protocols were not clear on who would be responsible for the identification<sup>101</sup>. Key UN agencies pointed out that states might choose to call migrants "smuggled" rather than "trafficked" to avoid incurring extra protection obligations, a speculation that has been born out by subsequent conduct.<sup>102</sup> To address the challenge of describing and distinguishing between the activities of smuggling and trafficking, **the drafters settled on a temporal rather than a substantive distinction**: smuggling as a one off harm to the state culminating in border crossing, trafficking as an ongoing rights violative relationship. The emphasis for smuggling on circumstances at the **start** of the migrant's journey and on the finite act of border crossing excluded attention to the migrant's experience in transit, on arrival or during residence, or to the other benefits (to smuggler or migrant from the facilitation of border crossing).
73. Third, the extent to which smuggled migrants required state protection and assistance proved controversial and contentious; somewhat irrationally, references to non discrimination were eliminated from the final document, but a last minute reference to the special needs of women and children was included. The confusion over the precise nature of human rights obligations owed by states to smuggled migrants continues.

74. After several drafts and much discussion, on December 12, 2000, the new international Convention on Transnational Organized Crime was opened for signature at a high level conference of states in Palermo, Sicily. The Convention included two protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [the Trafficking Protocol], and the Protocol against the Smuggling of Migrant by land, Sea and Air [the Smuggling Protocol]. These are generally referred to as the Palermo Protocols. A third protocol, on the Illicit Manufacturing of and Trafficking in Firearms was finalised 3 months later. The choice of location was not accidental for this was the notorious birthplace of the most legendary transnational organised criminal entity of all time, the mafia. The negotiations were concluded in record time, and according to the UN Office on Drugs and Crime, responsible for the convention, a high level of political commitment has been maintained since. The Convention and the two migration protocols are already in force. The Trafficking and Smuggling Protocols came into force on December 23, 2003 and January 28, 2004 respectively.<sup>103</sup>

### **THE TRANSNATIONAL ORGANISED CRIME CONVENTION**

75. The Convention itself was conceived of as a far-reaching measure to promote international co-operation in tackling a broad spectrum of cross border criminal activities, including money laundering, corruption, illicit trafficking in cultural treasures, endangered flora and fauna, as well as the links between these forms of "ordinary" transnational crime and cross border terrorist activity. An organised criminal group is defined as "a structured group of three or more persons... established to obtain, directly or indirectly, a financial or other material benefit". Two points are worth noting: that at least 3 people need to be involved – so a lone boatsman ferrying people across a waterway or a duo of smugglers guiding people through the desert across a land border, would not fall within the scope of the convention. Also, the benefit from trafficking or smuggling does not, have to be strictly monetary – labour, sex, service in kind qualify.
76. Organised criminal activity relating to irregular migration could simply have been included in the body of the convention. Instead separate instruments, the 2 protocols, were created to address what was increasingly regarded as a major international law enforcement problem. Were it not for the felt urgency of the law enforcement task, the international law making effort regarding irregular migration would not have come to fruition. Calls from human rights bodies over the years to address the consequences of irregular assisted migration never materialised for lack of political will or interest. Of course law enforcement and rights protection approaches are not necessarily mutually exclusive; a focus on the punishment of torturers, kidnappers or extortionists can go hand in hand with increasing the resources to protect those whose rights are violated in the process. But the two approaches may work against each other. Securing a human trafficking conviction may entail further jeopardising the future safety of precariously situated potential witnesses; protecting irregular migrants' rights may require relaxation of anti smuggling law enforcement measures. Since it is the law enforcement rather than rights protection agenda that drives the current process, the focus is on migration status and method of entry rather than on protection needs in the destination state.

### **THE FICTION OF FREE CHOICE**

77. The Palermo Migration Protocols are framed around a central dichotomy, between coerced and consensual illegal migrants, victims and agents. Implicit in this dichotomy is another, moral, division, between innocence and guilt. This dichotomy governs contemporary public policy, dividing the field into two distinct parts, one addressing the protection needs of innocent and deserving victims of criminal activity, the trafficking victims, particularly the traditional targets of protective concern, women and children; the other addressing the situation of culpable and

complicit actors who are eventually considered satisfied clients, the smuggled illegals. Smuggled illegals are considered less deserving of protection and support than trafficking victims, because of their original motive – the decision to **choose** to migrate illegally.

78. One of the principle achievements of the convention was to establish an internationally agreed upon set of definitions of the key terms, and to bring to a close decades of frustrating and inward looking debate about the distinction between human trafficking and human smuggling. The definition of trafficking in the Trafficking Protocol is complex:

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. ... The consent of a victim of trafficking in persons to the intended exploitation.... Shall be irrelevant where any of the means set forth [above] have been used. The recruitment, transportation, transfers.... Of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth [above].

79. This definition of coercion is expansive, a reflection of input from the human rights and feminist lobbies referred to earlier. Coercion is not simply brute physical force, or even mental domination, but includes "the abuse of a position of vulnerability". This can encompass a very broad range of situations, since poverty, hunger, illness, lack of education, displacement could all constitute a position of vulnerability. Whether a particular arrangement constitutes "abuse" may be as much a question of assessing the market or "going" rate for pricing a particular migration service as of characterising a personal interaction. Second, the trafficking definition requires exploitation, but exploitation itself is undefined. However the definition does include exploitation of the prostitution of others – pimping in other words- and it also includes a range of non sexual labour relationships, including "practices similar to slavery" such as indentured or bonded labour, child labour or oppressive forms of labour, but it is agnostic on whether prostitution itself constitutes exploitation, reflecting the deeply polarised views within member states of the international community on the topic. In sum, the critical ingredients for trafficking in persons within the protocol are the presence of exploitation, and the fact of coercion.<sup>104</sup> Cross border transport of the trafficked person is not required, provided the offence is "transnational in nature" (art 4) as defined in the TOC.
80. By contrast with "trafficking", the term "smuggling", following general practice<sup>105</sup>, refers to consensual transactions where the transporter and the transportee agree to circumvent immigration control for mutually advantageous reasons: the transporter derives a material benefit, the transportee a migration benefit. The Smuggling Protocol defines "smuggling of migrants" as: "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (art. 3). The two critical ingredients of this definition are illegal border crossing by the smuggled person and receipt of a material benefit by the smuggler.
81. The protocols share several key features. Both require state parties to criminalise the relevant conduct of traffickers or smugglers, to establish and implement domestic law enforcement mechanisms, and to co-operate with other states to strengthen international prevention and punishment of these activities. Both stipulate that the migrants themselves should not be subject to criminal prosecution because of their illegal entry. The two protocols also requires states parties to concretely address the root causes of vulnerability to trafficking and smuggling. For example the trafficking protocol requires states parties to "take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially

women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity" (art 9(4)). The smuggling protocol similarly requires states to promote or strengthen development programmes to combat the socio-economic causes of migrant smuggling. Finally, neither protocol explicitly requires states to implement any particular immigration benefits for victims, to regularise or expand lawful access to their territory, to address the chronic mismatch between supply and demand by increasing supply.

82. However the two protocols do differ in several key respects, particularly in the protections they afford migrants. The trafficking protocol addresses the need for protection of trafficked persons in some detail and provides for a broad range of protective measures. Though the requirements are couched in optional rather than mandatory language ("each state shall consider implementing.... In appropriate cases..."; "...shall endeavour to provide": "shall consider adopting legislative or other appropriate measures", they establish a useful and facilitatory framework for intervention to enhancing human rights protections for trafficked persons. Article 6(3) in particular reflects the extensive inputs of human rights organisations into the protocol's drafting process. It requires states to consider "implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons"; this includes co-operation with NGOs, and provision of housing, counselling, medical psychological and material assistance, employment and training opportunities. It even requires states to consider adopting legislation to enable trafficking victims to remain in their country "temporarily, or permanently, in appropriate cases (art. 7). If domestically enacted, adequately funded and energetically enforced, these measures would constitute significant benefits for trafficked persons.
83. The smuggling protocol, by contrast, contains rather minimal reference to the protection needs of smuggled persons. The preamble to the protocol sets out " the need to provide migrants with humane treatment and full protection of their rights", and expresses concern that "the smuggling of migrants can endanger the lives or security of the migrants involved". This, combined with the prohibition on criminalisation of migrants, articulates an important and useful international commitment to a basic level of protection. This is significant given the pervasive use of de facto punitive measures against smuggled migrants.
84. The Smuggling Protocol includes other potentially useful protective measures: states are required to "ensure the safety and humane treatment of the persons on board" vessels that are searched (art. 9); and to implement their pre-existing non derogable obligations under international law, to protect the right to life and the right not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment [art 16(1)]. States parties are also required to embark on a range of prevention measures (art 15) including strengthening domestic information programs to increase public awareness of the dangers facing smuggled migrants; collaborating with other states to prevent migrant recruitment by criminal gangs; and most ambitiously promoting or strengthening "as appropriate, development programmes and cooperation at the national, regional or international level, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas... to combat the root socio-economic cause" of migrant smuggling. In practice state parties have so far paid little attention to the smuggling protocol, choosing to focus first on the trafficking protocol. These prevention measures seem destined, for the moment, to remain – as others have before – paper commitments, honoured more in the breach than the practice.<sup>106</sup>
85. Despite these important provisions, however, the specified measures stipulated in the protocol fall short of anything approaching "full protection of [the migrants'] rights". There are no provisions regarding medical, psychological or social recovery, collaboration with NGOs, or temporary legal residency as in the trafficking protocol. Nor are the inclusive rights to non-discriminatory treatment discussed above and derived from relevant international law included in

the convention. Moreover, even the requirement to afford at risk smuggled migrants protection is very heavily qualified: states should "take appropriate measures to afford migrants appropriate protection" against violence from smugglers and where their lives are endangered. "Appropriate" to whom and what? This clause undercuts the more robust protections afforded by the recently ratified Convention on the Rights of Migrant Workers and their Families.<sup>107</sup> At the same time, the protocol explicitly endorses the possibility that states can detain smuggled migrants provided they are afforded the requisite consular access, and it requires states to remove smuggled migrants back to their home countries expeditiously.<sup>108</sup>

## PART IV

### CONCEPTUAL GAPS AND CHALLENGES

#### THE CONSENT/COERCION SEE SAW

86. It is hard to justify a radical gap between the protections accorded to trafficked persons and those accorded to smuggled persons if the two groups overlap significantly. This would be the case if the conceptual boundaries between the two categories were blurred, or if the factual circumstances characterising them were similar. In this section we explore these questions. We start by outlining two common fact pictures.
87. Y agrees to pay \$50,000 for transport between the home and the destination state; a deposit of \$1,000 is handed over before the trip, the balance is payable in instalments from working in slavery like conditions for 10 years. If the worker defaults, onerous interest payments become due; if he or she defaults further, threats are made (and eventually executed) against family members back home.
88. Z, a sex worker, accepts a work contract in another country as a hostess, a bar dancer, a sex worker. But on arrival, the terms of employment turn out to be quite different from those promised: her passport is kept, her accommodation is atrocious, her pay is withheld, her employers are brutal.
89. Have Y and Z been smuggled or trafficked?
90. The Palermo Protocols' distinction between deserving victims of trafficking, and deceitful smuggled migrants polarises policy around irregular migration. It highlights the difference between two sets of harms that are of concern – the creation of human victims, forced or tricked into travelling abroad, deserving of state protection and even, on occasion, residency; and on the other hand the breaching of state laws through smuggling, a business contract entered into by those willingly defying immigration control to secure an illicit economic advantage for themselves. Whether one is classified as a smuggled or trafficked migrant has serious practical repercussions for one's access to human rights protections. There is a lot to gain from being classified as trafficked, a lot to lose from being considered smuggled. Smuggled persons are often detained and usually returned home without due process protections; trafficked persons may be eligible for generous benefits, and may even qualify for residence in the destination state. If the classification system is to work, it has to be applicable clearly and unequivocally as states make decisions about what treatment to accord the assisted irregular migrants they encounter.
91. But this dichotomy obscures more than it illuminates. First, the distinction itself is unsustainable in terms of law breaking: state migration laws are breached by trafficking (though some trafficked persons may have valid asylum claims, others will have no legal immigration status), human beings rights are violated by smuggling (violation of the right to life being the most obvious). Second, the distinction is difficult to implement in practice: at the point of departure and at multiple stages of the journey it may well be unclear which category of irregular migration is at issue – trafficking or smuggling. And the most accurate classification may change over time. The available evidence suggests that most transported undocumented migrants consent in some way to an initial proposition to travel, but that en route, or on arrival in the destination country, circumstances frequently change. To quote a recent ILO report: "In the first stage [of irregular migration], potential migrants generally consent to emigrate. Coercion is rarely used prior to departure from the country of origin"<sup>109</sup>. This is not to deny the existence of "pure" cases – of children kidnapped without their parents' consent, of migrant workers defrauded from the outset, or, at the other end of the spectrum, of completely transparent cross border

transportation agreements where a fee is mutually agreed and the relationship between transporter and transported ends. The variety of migration strategies and circumstances defies easy categorisation. When should the determination of category be made and by whom?

92. Third, the distinction depends on a flawed conception of human agency<sup>110</sup>. It presupposes a hard and fast divide between two motivational states – consent and coercion.
93. At first sight this is plausible. We do want to distinguish agreements people enter into voluntarily, agreements they consent to, from those they enter into as a result of coercion, because we do not consider the latter real agreements at all and so we think they should not bind the coerced person as 'real' agreements do. We do not think that a person should be held responsible (or punished) for coerced agreements, e.g. when kidnapped to cross a border illegally to engage in domestic slavery. But the distinction between coercion and consent is complex. How should we characterise coercion? Does someone with a gun to their head consent to hand over their money when robbed?<sup>111</sup> Most would say no. But does someone who sells his kidneys because his children are starving consent? Translated into the migration context – do persecution, destitution, heartache from prolonged family separation constitute guns? Are refugees "choosing" to avail themselves of the services of travel professionals to get false travel documents, cross unguarded borders or create fictive identities, or are they "coerced"? Some<sup>112</sup> have sought to distinguish between specific interpersonal **threats** (e.g. the gun) which are coercive, and personal circumstances (e.g. poverty, illness) which restrict choices but are not coercive. Others have argued that this distinction (though empirically valid on a restricted interpretation of coercion) cannot be morally sustained, because destitution is as coercive as physical force. The Palermo Protocols adopt a version of the latter position. As shown above, the trafficking protocol defines coercion to include not only force (e.g. kidnapping) but also "the abuse of power or of a position of vulnerability". The latter however is not defined, and it remains to be seen whether states and courts will interpret it as including extreme poverty. If they do many cases currently considered instances of human smuggling will be brought under the trafficking protocol. If they do not, then the political point of expanding the concept of coercion beyond mere physical force, fraud or deceit could be lost.
94. Another difficulty with the consent/coercion dichotomy is the presumption of permanence. It presupposes that the two situations are permanent and clear cut: either someone is coercively trafficked or he or she is consensually transported. But consent to a given act or situation does not preclude withdrawal of consent at a later stage, with different circumstances – it is not necessarily a permanent state. At what point should the decision about how to characterise the conduct be made? States tend to favour the point of departure, as an indication of the migrant's "true intentions"; rights advocates favour the time of arrival or stay, as an indication of the migrant's needs. Either way it is clear that the presumption of a permanent state of being coerced or consented evades a critical policy decision.

#### **MUTUALLY ADVANTAGEOUS EXPLOITATION – FORCED LABOUR MAY BE CHOSEN.**

95. A further complication arises in deciding how to characterise situations of "mutually advantageous exploitation", a very common circumstance for smuggled migrants. The transporter benefits from his or her profit, the transportee benefits from gaining access to an employment opportunity, even if the smuggling fee is exploitative. The smuggling fee from China to the US is about \$50,000 per person; to France about \$40,000.<sup>113</sup>
96. Moreover many of the employment opportunities that smuggled migrants are keen to access constitute "forced labour" in international law terms – paradoxically they are forced but chosen!<sup>114</sup> Are these workers smuggled (because they surely consent) or are they trafficked

(because the exploitative offer is actually a threat – if they didn't accept it they would lose the opportunity to find work)? According to the philosopher Frankfurt, a proposal "acquires the character of a threat" when the proposer has the person in his power and demands "an exploitative price"<sup>115</sup>. Certainly the smugglers are taking advantage (is it unfair? If so according to what metric?) of the smugglees' desperation or vulnerability.

97. But are all exploitative offers coercive and vice versa? The answer is that they are not: hawkers selling airline tickets to the Olympics may charge exploitative prices but they are certainly not coercive; and conversely, a parent forcing a child to travel abroad to practice a foreign language before an exam is coercive but not exploitative<sup>116</sup>. So just because the smuggler's offer is exploitative does not necessarily mean that the smugglee is coerced. For that to be the case we need an independent yardstick. If the smugglee has no other acceptable options, then the exploitative offer becomes coercive: if the smugglee would starve, or be unable to get medicine for a child unless he or she took up the offer, then we could say that the offer is coercive. In these situations, the fact that the smugglee consents (because the deal is mutually advantageous) does not alter the fact that it is coercive. The critical issue is to determine which alternatives are considered acceptable and which are not. This brings one back to international norms, and to what Wertheimer calls the "moral baseline". In assessing what counts as coercive and what counts as consensual, we, as policy makers, as state parties are forced to engage moral decisions about what types of conduct are acceptable or permissible in a society and what are not. Slavery and slavery like work are clearly not acceptable, but neither is destitution – lack of access to essential food, medicine, shelter.
98. We can transpose this discussion to the distinction between smuggling and trafficking as set out in the Palermo Protocols. . If the person consents to be transported, knowing what the working conditions abroad will be like, then according to TOC the person is smuggled - unless the consent was obtained by force, or by undue influence or "abuse of a position of vulnerability", because the person had no morally acceptable alternatives. But by this standard, many people who are not considered "smuggled" should fall within the category of trafficking victim, even though they have formally consented to travel and/or to engage in exploitative work in the destination state.

## **A BLURRED DISTINCTION LEADS TO INCONSISTENT POLICY**

99. Not surprisingly, the combination of contradictory goals encompassing both inclusionary and exclusionary mandates, confused conceptual boundaries with key terms such as "exploitation", "abuse of a position of vulnerability" undefined, and enormously high stakes at issue for millions of impoverished members of the global community (who, unlike a former era, can imagine themselves living in different countries and circumstances) has meant that government policy, both domestically and internationally, has been essentially self defeating. Instead of reducing the pressure and the incentives to seek commercial assistance for migrating illegally, by increasing employment opportunities elsewhere, expanding legal migration routes and strengthening the hand of would be migrants against the bargaining power of migration professionals, the evolving policy framework has exacerbated both. What is the way out though? How can the real and often justified apprehensions and insecurities of domestic populations, who see the possibility of wage under cutting or work export, be assuaged so that xenophobia and exclusion do not dominate migration policy, and create a climate where labour needs can only be satisfied adequately by insecure, underprotected irregular migrant workers?

## THE POLITICAL COSTS OF ADVOCATING FOR SMUGGLED MIGRANTS' RIGHTS

100. Smuggled migrants, who cannot prove that they were coerced into initiating the migration, are generally a political liability as a cause. This explains why benign neglect is the high watermark of government protection for this category of undocumented migrant, until the migrant is at death's door, when operative breast beating<sup>117</sup> and a last ditch life saving exercise swings into play. Frequently governments invest much greater resources of time and funding after smuggled migrants have died than they would ever consider making available before. The minimal, posthumous, concession to the common humanity of these migrants is powerfully illustrated in the following chilling excerpt about a group of smuggled Mexicans who died while attempting a clandestine entry through the Arizona desert:

"The unofficial policy was to let them lie where they were found.... All cases, for all cops require paperwork. The Border Patrol is no different. Each corpse generates a case file. Every unidentified corpse represents one case forever left open.... But uncollected – unreported – bones generate no files...(19)... Forensic evidence would consist of such things as fingerprints. But the nature of desert death is such that forensic evidence is quickly obliterated. The body mummifies. In one of the million ironies of the desert, those who die of thirst become waterproof. ... Many of the dead have gold or gold-rimmed or missing teeth and their photographs offer the final indignity: they have white rubber-clad fingers jammed in their mouths, pulling their lips apart in maniacal grimaces, to reveal these orthodontic details. For these few, it has to be the teeth; there is literally nothing else.

The bodies that are identified... are embalmed, then placed in a cloth-covered wooden casket. This undertaking costs \$650. If they are to be flown home, the "air-tray" to hold the casket costs an extra \$50. The Mexican consulates pay for the embalming and other parties – sometimes the governments of the walkers' home states - pay for the flights. For more than 80% of the dead it is the most expensive gift they have ever gotten"<sup>118</sup>.

101. Resorting to human smuggling as a means of border crossing places migrants in the position of commodifying and objectifying themselves – they become a body, a thing that needs to be transported across the border, not inherently different from other items such as antiquities, body parts or stolen cars. While they are living bodies, they are for the purposes of the smuggling operation, illegal things, akin to other contraband inanimate goods. But, as the quote above shows, a radical transformation takes place at the borderline between life and death – the thing, the body suddenly becomes a soul, a human. And so, at the point of death or just before, law enforcement, exclusion, the cat and mouse chase between illegals and immigration agents dramatically shifts to a different register – saving a human life. Paradoxically it is only in relation to the imminent prospect of death that the smuggled person's life has value, regains a human identity, human dignity, recognition as a person before the law. So if the smuggled person is found comatose, at death's door, expensive efforts will be made to revive him or her – not to chase him, or detain him or punish him as when he is fully alive. This perplexing transformation is evident throughout human smuggling – the hated and despised illegal sneaking across the border or hidden in the hold of the ship becomes the vulnerable and pitied migrant to be heroically clutched from death's door or the shocking corpse eliciting cries of mea culpa: the Chinese cockle pickers who perished off the coast of England, the Ghanaian boys who froze in the undercarriage of a transcontinental airliner, they only became human when they are about to or have ceased being human. Urrea captures this contradiction perfectly: "The men walked onto the end of a dirt road. ... Now they had a choice. Cross the road and stagger along the front range of the mountains, or stay on the road and hope the Border Patrol would find them. The Border Patrol! Their nemesis. They'd walked into hell trying to escape the Border Patrol, and now they were praying to get caught". (14).

102. A policy that produces, on a regular basis, these results is unjust and ineffective. The results compel the conclusion that alternatives to current policies urgently need to be sought. It is in no-one's best interests for thousands of "good hearted and hardworking people", as President Bush

calls them, to lose their lives trying to access working opportunities where they are in demand. What would the elements of a more just and effective, rights based policy towards smuggled migrants consist of?

## **PART FIVE**

### **ELEMENTS OF AN ALTERNATIVE AND MORE EFFECTIVE POLICY APPROACH**

#### **ELEMENTS OF A RIGHTS BASED POLICY: IN-COUNTRY TREATMENT OF SMUGGLED MIGRANTS.<sup>119</sup>**

103. A rights based policy needs to be janus faced. It needs to look inwards and inform the in-country treatment of undocumented or irregular workers and their families, living within the jurisdiction of the state. But it also needs to look outwards and take stock of circumstances in countries of origin and transit for irregular migrants, so that the exclusion or deportation policies adopted by the destination state do not lead to foreseeable human rights violations abroad<sup>120</sup>. Rather the policy needs to ensure a minimum floor of rights for all, including irregular migrants with no asylum or other apparent lawful immigration claim to remain within the state.
104. What would the domestic policies informed by such a rights based approach look like? The international norms outlined above, derived from human rights law, labour law and international criminal law provide a useful and realistic framework. These norms are not the product of idealistic scholars or activists removed from the political constraints of statehood. Rather they represent the collective agreement of the international community, of states parties, regarding a minimum floor of required protections. As such they must be considered realistic and binding.
105. At a minimum, domestic policies should include diligent and energetic enforcement of health and safety standards in work place, so that slavery and slavery like conditions cease to exist at the heart of prosperous destination states. This should be considered as critical an aspect of domestic law enforcement for the common good as taxation. They should also include minimum wage and labour rights enforcement (holidays, overtime payments, right to unionise, unfair dismissal and redundancy protections<sup>121</sup> – access to free primary education for all children irrespective of immigration status, to protection from physical or domestic violence and to basic medical and psychological care for all irrespective of status. They should also include other fundamental rights protections, to free exercise of speech and religion, to freedom of movement within the state, to privacy, to minimum standards of treatment by law enforcement agents, to competent and linguistically accessible representation in legal proceedings.
106. Domestic policies should also be directed at the goal of strengthening the position of migrant smugglees against their exploiters, as this would be an effective way of both reducing the extent of rights violations and irregular migration. One strategy would be to enhance the legal protections for smuggled persons coming forward to give information about smugglers. Clearly this could not be a blanket policy, since states would be understandably reluctant to legitimise the position of smuggled migrants across the board. But a policy which ruled out such protections in all cases would also be irrational: children, victims of human rights abuses, forced or bonded labourers should have exit strategies from exploitative relationships which don't confront them with the catch 22 of deportation or continued oppression.
107. A second strategy, already indicated earlier, would be to dramatically increase work place inspections and other labour protections, so as to narrow the scope for exploitative use of migrant labour. Of course the difficulty with this strategy is that it can quickly work against the interests of smuggled migrants because inspections may lead to work place closures and to detection, detention and deportation of illegal workers<sup>122</sup>. Labour protections have to be coupled with other rights enhancing strategies to produce durable results.

108. As we have shown, criminalisation as a strategy for curbing irregular migration does not appear to have been successful. The case studies suggest that extra hurdles simply get passed on as higher transaction costs to the smuggled migrants themselves in the shape of increased smuggling fees and more dangerous border crossing journeys. Another strategy that takes advantage of the force of criminal law enforcement could be to separate the criminal aspects of conduct from the migration aspect, and prosecute smugglers for "ordinary" crimes such as kidnapping, assault, rape, theft or blackmail. Again, some form of immigration guarantee would have to be made available to enable the undocumented migrant victims to give evidence without risking detention or removal.
109. Finally states should also revise their immigration policies to take stock of what a safe and realistically managed migration policy based on domestic need and demand would look like. Thus human rights policies should inform access to residency and citizenship, so that workers and their families have entitlements to regularise their status within a reasonable time period,<sup>123</sup> and thereafter to qualify for citizenship on an equal basis with other non nationals once qualifying criteria are met. Long term involuntary marginalisation of large sections of a state's working population is anti democratic and not in the clear interests of anyone except those seeking to exploit labour vulnerability or immigration need.
110. The American Bush/Fox 2001 proposal offering temporary worker status to undocumented migrants in return for a one-time registration fee exemplifies what such long-term involuntary marginalisation and rights curtailment would look like. It would be a far cry from the rights based policy just discussed. Not only would the proposal, as it currently stands, prolong the temporary and second class status of the applicant workers, by granting time limited permissions to remain within the country, requiring timely renewal on expiration, but the proposed status includes no permission for family members to join the worker. Given the lack of permanence or respect for the right to family life, it seems unlikely that the scheme, were it to be implemented, would contribute to a reduction in illegality unless it was accompanied by increased employer sanctions or other punitive measures; nor is the scheme likely to significantly improved long-term protection for the migrant workers concerned.

## **A RIGHTS BASED APPROACH TO EXCLUSION OF IRREGULAR MIGRANTS**

111. A rights based approach must also inform the exclusionary aspects of migration policies of destination states. States are responsible for human rights violations committed on deportees or expellees outside their borders. So they have protective obligations to pre-empt reasonably foreseeable harms inflicted by others. Torture for example, is impermissible, in all circumstances, so smuggled persons should not be returned to countries where they will face physical retribution or enslavement for non payment of smuggling fees, or for having left their home country without permission, or for having engaged in certain types of socially stigmatised work such as sex work.
112. States must also take into account fundamental human rights such as the right to respect for family life when considering deportation or exclusion of some family members. Deportation of irregular migrants who have spent years living and working in destination states, who have built up families and close community ties, may violate the rights of citizen relatives such as spouses or children of the irregular migrant. The interests of children in particular require special attention. The right to respect for family life does not entitle irregular migrants to insist on conducting that life in the state where they are resident if family life could be continued in the migrant's home country. However transplanting a whole family to the migrant's home country can present serious problems: it may be impossible for the spouse or children to lead full lives, it

may result in irreversible damage to a child's private life including education, community integration, access to education, maintenance of an acceptable standard of living.<sup>124</sup>

113. States would also be well advised to consider strengthening the group rights of migrant communities, adopting a series of complimentary holistic strategies which address the underlying factors that precipitate human smuggling. The Palermo Protocols call for such measures<sup>125</sup> but exhortatory statements alone will change nothing. The commitment of significant resources, financial and human, is essential to achieve results. But it would be a cost effective allocation, which in time could yield savings at border control and other enforcement sites. Enhancing the resources, the resilience, the independence and the choices of affected communities, taking steps to increase their access to sources of employment or self employment in either the home or destination country, to facilitate access to services, education, trade, could yield far greater reductions in human smuggling than further enhanced militarisation of borders and criminalisation of traffickers. States will need to find creative ways of justifying to the xenophobic elements of their electorates why such policies are rational and fiscally justified, and how they complement or replace the more immediately plausible exclusionary immigration policies.

#### EUROPEAN UNION INITIATIVES – A MINIMAL STARTING POINT FOR FUTURE ACTION

114. In 2002 the Council passed a number of Framework Decisions prohibiting unauthorised entry and residence, all of which criminalise the facilitation of illegal migration and call on states to adjust their national laws accordingly.<sup>126</sup> But while the smuggling of migrants is made a punishable offence under EU law, punishment for the act of illegal migration itself is largely left to the discretion of states.
115. Despite its overwhelming focus on security, police co-ordination, and border control, migration law at the EU level does provide some minimal protections to migrants. The most important instrument here is the Council Directive on the **short-term residence permit** issued to victims of action to facilitate illegal immigration or trafficking.<sup>127</sup> The Council Directive makes a 6-month residence permit available to all “victims” of illegally facilitated migration who have suffered harm, who are willing to co-operate with law enforcement officials to prosecute their traffickers or smugglers, and who are “useful” to the proceedings. Despite the fact that this short-term residence permit provides not just regularisation of status but also emergency medical care and social assistance to some irregular migrants, it was never envisaged as a protection provision. The fact that only migrants who are both willing and able to provide “useful”<sup>128</sup> evidence in court are eligible for a permit demonstrates the instrumental nature of the policy, as does the fact that the permit expires after 6 months or the conclusion of proceedings (after which the migrants must seek some other form of authorisation to remain). Likewise, the fact that the residence permit is available to all commercially assisted migrants who have suffered “harm,” whether trafficked or smuggled, does not indicate the progressiveness so much as the pragmatism of EU migration policy. It also confirms the point made above that the distinction between the two forms of assisted irregular migration is hard to apply in practice. As the European Commission notes in its explanatory memorandum, “an instrument that applies to both types of offence is likely to be more effective than one that targets only one of them.”<sup>129</sup>
116. The EU experts group on trafficking is of the opinion that short-term residence permits “should be granted to identified trafficked persons, independent of their willingness to co-operate as a witness and regardless of whether or not the perpetrators are prosecuted. Those trafficked persons who do not wish to testify as witnesses – or are not required as witnesses, because they possess no relevant information or because the perpetrators cannot be taken into custody in the

destination country – require equally adequate protection and assistance as victim-witnesses.<sup>130</sup> This is consistent with UNHCHR Guidelines on Trafficking<sup>131</sup>.

117. The Council Directive on the short-term residence permit is consistent with the EU policy of “managed migration” set at the Tampere summit in 1999 in that it addresses both trafficking and smuggling with a single, unified strategy. At Tampere, the EU acknowledged the complexity and interrelatedness of all forms of migration, and it professed its commitment to manage migration both proactively (by addressing root causes in sending countries and opening up channels for legal labour migration) as well reactively (keeping the asylum system open). This unified migration strategy demands a dual focus on both law enforcement and human rights, as official EU statements have repeatedly confirmed.

### **MOTIVE VERSUS STATUS: THE CLASH OF FRAMEWORKS AND THE CHALLENGE**

118. In practice, however, policies at the national and supranational levels in Europe “have tended to concentrate on identifying trafficking as a crime, and apprehend[ing], disrupt[ing] and punish[ing] traffickers” while neglecting migrants’ welfare and safety in their current situation<sup>132</sup>. This leads to a skewed migration strategy, since a purely criminal-law approach, focusing as it does upon intent and the initiation of movement and the crossing of the border, privileges the immigration enforcement concern to the detriment of attention to migrants’ protection needs in the present moment. A human rights based policy conversely would start from status considerations – looking at the needs and harms currently faced, ignoring moral issues of desert or reward in assessing the need for minimum protections, and relegating questions of intent or motive to a later stage.
119. There is a close parallel here between the UNCTOC and these recently developed EU provisions against irregular, commercially-assisted migration<sup>133</sup>. Both are first and foremost concerned with the intended purposes for which traffickers and smugglers initiate the movement of migrants across borders – for sexual exploitation, for “material benefits,” etc. – and the consent, or lack thereof, of the migrant. They implicitly oblige the migrant to prove the purity of his or her motives in order to be classified as trafficked (and worthy of protection and assistance) and not as smuggled. The US Trafficking Victims Protection Act demonstrates this preoccupation with intent well: not only must trafficked migrants show that they did not consent to the movement (a good example of the misconception that consent is a permanent state rather than a contextual one – see discussion above) in order to be considered eligible for temporary residence permits, but they must further show that they are of “good moral standing” in order to turn that temporary residence permit into a permanent one. This is a requirement that excludes all pre-departure sex workers from protection, and one that advances a puritanical moral agenda rather than addressing urgent needs for human rights protection. To shift from this approach to a rights based policy will require a sustained effort to alter institutional ideology and practice towards smuggled migrants: it will require confidence that rights protection will improve and not worsen the management of migration in the medium to long run, a tall order at this point.

## PART SIX

### CONCLUSIONS

#### TOWARDS A MORE NUANCED AND COURAGEOUS POLICY?

120. What is needed is an integrated policy which recognises the common needs of migrants whose rights are violated, and which deals with human rights and fundamental protections not as an add on or an adjunct to immigration decision making, but as a critical and autonomous area of state responsibility, akin to the obligations of states towards fundamental human rights protections for their own citizens. This non-discriminatory obligation precedes, as a matter of international law, status based legal classifications related to immigration category and it should also form the basis of any self respecting migration policy. Politicians and administrators will need some vision and courage to take this stand, but in practice it is more in tune with current and future needs of a rapidly globalising world than the sectional and parochial approach that dominates migration control today.<sup>134</sup>
121. As a separate matter, and administered by different officials with appropriate training and expertise, immigration benefits and penalties should be allocated to the variously situated undocumented migrants, in line with states' international legal obligations. States need to decide, in a more nuanced and detailed manner than they have so far, how and where they are going to make their categoric decisions and how they are going to incorporate international law into those decisions. For example, they need to decide whether a smuggled migrant "consensually" working in slavery like conditions well below the minimum wage to pay back his or her smuggling fee, will be categorised as a forced or bonded labourer, thus bringing the person within the Trafficking Protocol with its associated protections; they need to decide whether a sex worker who has been subjected to blackmail or physical abuse, or whose working arrangements bear no resemblance to those agreed before the border crossing, counts as trafficked despite the initial "consensual" decision to embark on the journey and to accept the sex work contract with all its predictable problems. And they need to acknowledge that, wherever they draw the lines, discretion will need to be exercised by experienced and skilled officials whose institutional mandate is rights protection as much as it is border protection.
122. Following this scrutiny it will become apparent that some migrants fall within the definition of "trafficked person" and should be granted temporary leave to remain to recover from abuse, to pursue prosecutions, to trace family members, to decide on future options; that others should be granted permanent residence because they are refugees, or because international law prohibits their return since they would face torture or serious human rights violations if removed; and that yet others, because of the length of time spent in the destination country, should be allowed to remain because to remove them would violate their established rights to private life. Yet others, who do not fall into these categories, and who lack other qualifying circumstances, should be refused permission to remain and, subject to exhaustion of due process rights to challenge the exclusion decision, could be deported or removed.<sup>135</sup>
123. As we have seen, determining who is coerced and who has consented or freely chosen to cross a border illegally is complicated and requires the taking of detailed case histories and considerable background knowledge about states of origin, states of transit and employment arrangements within particular industries. It also requires states to give this decision making process much more careful thought and attention than they have to date – to switch their focus from the simplistic condemnation of traffickers and pity for victims, to a sophisticated consideration of different irregular migration scenarios and their appropriate classification. Once this process has been undertaken – and grass roots border patrol agents, immigration officials, NGOs, community associations, newspaper reporters, trade union and other labour rights groups should

be involved in the process to share their expertise and experience - then sensible determinations about who should be considered "trafficked" and who should be considered "merely" smuggled or irregular can be made. Certainly defensible distinctions can and should be drawn, but they must be based on the facts on the ground, not on political agendas driven by extraneous considerations

124. Saying, as we have, that the distinction between coercion and consent is complex and best conceived of as a continuum rather than a dichotomy, is not the same as saying that there is no useful purpose to the distinction.<sup>136</sup> There are clear cut cases which fall at one or other end of the spectrum and they should be treated accordingly. Where the distinction is not clear, however, significant investment of administrative resources will be necessary to ensure that basic human rights protections are not violated by superficial and speedy decision making designed to service immigration exclusion agendas and populist deportation statistics rather than underlying obligations to impinge on abusive migration and labour arrangements.
125. Whatever one's answers to this complex array of questions, it is clear that, at a minimum, states need to be compelled by their electorates to adopt rights based policies that are non discriminatory, that recognise the inalienable dignity and fundamental entitlements to basic protections of all persons within their jurisdiction. This is something electorates accept implicitly when shocked and outraged by clamorous news stories. However these sentiments fade fast from public attention and it is the responsibility of courageous opinion formers and policy makers to keep the sentiments alive even as attention fades. Electorates need to acknowledge that the troubling images of starvation, dehydration, enslavement, abandoned children, discriminatory exploitation, deprivation of the basic necessities of life that trouble and move them as discrete episodes, are not exceptions to otherwise acceptable labour policies, but constituent parts of those policies which urgently require change. Without a robust enforcement of the principle of non discrimination, a fundamental tenet of international law for the last half century, irregular migration will continue to proliferate, to cause harms to migrants (physical dangers, deprivation, family separation, exploitation) and the host societies they service (dilution of basic human standards, irregular border crossing, security risks, underprotected populations) alike.

## **A HUMAN RIGHTS AUDIT FOR MIGRATION POLICY**

126. Instead migration policy would benefit from being subjected to a human rights audit as it is developed, to monitor and assess the human rights consequences of particular policies, and to highlight the causal links between migration control or exclusion goals and escalation of rights violations on the one hand, and, conversely, rights enhancing policies and gains for orderly migration management on the other. This audit would provide pointers not only for improving rights protection, but also for making border control more effective in the medium to long run. Examples of pointers that such an audit might reveal include the relation between reduction or slowing down of family reunion visas and the growth of child smuggling ; the militarisation of certain parts of borders and the increase in fatalities at other parts (with attendant health, burial and law enforcement costs); the exclusion of undocumented populations from welfare benefits and the rise in infant mortality or malnutrition, in pregnancy complications. On the positive side, a human rights audit of an enabling set of policies which increased vulnerable populations' control over their own resources and choices (as several EU policies have done) might indicate a reduction in abusive migration practices (intra EU migration has confounded the dire predictions of those opposed to free movement in the early stages – net migration from the poorer south to the wealthier northern EU states is less than expected, but from the dark and cold north to the sunny and warm south higher).<sup>137</sup>

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- <sup>1</sup> ILO (2004) *Towards a Fair Deal for Migrant Workers in the Global Economy*, International Labour Conference, 92<sup>nd</sup> session, report VI.
- <sup>2</sup> End of Year Press Conference, Monday December 20, 2004 10:33am EST, Room 450, Eisenhower Executive Office Building, Washington D.C.
- <sup>3</sup> The 1904 International Agreement for the Suppression of the White Slave Traffic, which focused on "the procuring of [European] women or girls for immoral purposes abroad (Art.2) was primarily a law enforcement instrument emphasising detection and repatriation.
- <sup>4</sup> Not all would agree with this statement. Some authors have argued that the Refugee Convention and post war refugee policy more generally were in states' self interest, because they represented a means for controlling what would otherwise have been an unstoppable flow of irregular migrants, see James Hathaway, The Law of Refugee Status (Toronto: Butterworths. 1991) 231: "Refugee law is a politically pragmatic means of reconciling the generalized commitment of states to self interested control over immigration to the reality of coerced migration".
- <sup>5</sup> Art. 33 CSR 51.
- <sup>6</sup> This is for several reasons. Migrants themselves are often reluctant to present themselves to the authorities in destination countries for fear of deportation by those authorities or reprisals from their traffickers. Authorities in source countries may be loath to divert resources to combat the illegal migration of their citizens, especially in cases where remittances from smuggled migrants working abroad constitute a substantial proportion of their economy. And authorities in destination countries may not undertake serious studies of the issue because their own economies are predicated upon a constant supply of low-wage, undocumented workers, or because individual border guards and customs officials are complicit in smuggling operations themselves. If they do record numbers, they may artificially inflate them (to justify increased policing of the border) or deflate them (to make their border controls appear more effective than they are). These structural disincentives to record accurate information are compounded by problems of inconsistent terminology. Some studies take into account all irregular migrants (whether assisted or not); others consider smuggled migrants; others consider only trafficked migrants; and still others consider only women or children (not men) trafficked for the purposes of sexual exploitation (not forced labour). This confusion, of course, makes inter-agency and inter-governmental information-sharing especially difficult.
- <sup>7</sup> UN Economic and Social Survey 2004.
- <sup>8</sup> Walter Ewing, "From Denial to Acceptance: Effectively Regulating Immigration to the United States," *Immigration Policy in Focus* Vol. 3 No. 5, Immigration Policy Center, November 2004: 6. Quoting the U.S. General Accounting Office, "Alien Smuggling: Management and Operational Improvements Needed to Address Growing Problem," GAO/GGD-00-103, May 2000.
- <sup>9</sup> Luis Alberto Urrea, The Devil's Highway (New York: Little, Brown and Co. 2004) 49. [hereafter Urrea], 180.
- <sup>10</sup> [Monette, it would be good for each country researcher to get official figures for numbers of migrants who were injured or died in transit, including suicides in detention pending decisions about immigration status, or who had migration related health problems on arrival if these figures exist].
- <sup>11</sup> Rather than describing responses to migration, including irregular migration, as pro or anti, it is more useful to think in terms of a spectrum of adjacent perspectives, different evaluations of the "series of trade-offs between competing goods", Susan Martin and B. Lindsay Lowell, "Competing for Skills: US Immigration Policy Since 1990", April 2004, Institute for the Study of International Migration (ISIM) website, 3. [hereafter ISIM].
- <sup>12</sup> As is well known, hundreds of migrants die from dehydration and exposure on the US/Mexican border each year. The passage through the Sahara Desert (to Morocco and then onto Europe) also claims lives annually. In 2001, 17 Nigerian migrants were discovered by police after their vehicle broke down and their smuggler/guide abandoned them; several of their fellow travellers had already died of thirst.
- <sup>13</sup> In June 2000, a truck carrying tomatoes into Britain was stopped in Dover; 60 Chinese migrants were found hidden in the sealed back compartment, 58 of whom had died from lack of oxygen. In October 2001, a group of 25 Chinese migrants suffocated while hiding in the storage tank of a fishing boat on its way to South Korea. Their bodies were dumped at sea when discovered, igniting diplomatic outrage. In May 2003, 18 of at least 60 Mexican and Central American migrants died of suffocation in the back of a truck crossing over the border into Texas.
- <sup>14</sup> In September 2003, 7 undocumented Pakistani migrants were killed when they stumbled onto an unguarded minefield as they crossed the border from Turkey into Greece.
- <sup>15</sup> In October 2004, a ship carrying undocumented Moroccan and Tunisian migrants sailing to Italy capsized; about 50 of the passengers drowned.
- <sup>16</sup> In December 2000, 2 Cuban asylum-seekers froze to death while hiding in the undercarriage of a flight from Havana to London's Gatwick Airport.
- <sup>17</sup> Mexican migrants who hire smugglers to help them across the US border typically pay a first instalment up front; once they cross the border they are held by their smugglers in "safe houses" until their relatives send the second instalment and buy their release. The OAS's Inter-American Commission on Human Rights notes that

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- overcrowding and poor sanitary conditions are common in safe houses. Abuse and sexual assault reportedly also occur, but the scale is unknown.
- <sup>18</sup> Urrea, 196.
- <sup>19</sup> Gao Yun, *Chinese Migrants and Forced Labour in Europe*, (July 2004) ILO Geneva, 7; unpublished report on file with the author.
- <sup>20</sup> Christine Inglis, "Australia mulls seasonal migrant labour scheme", MPI Migration Information Source, September 1, 2003.
- <sup>21</sup> Migration News: Spain and Portugal: Legalisation.  
[http://migration.ucdavis.edu/mn/comments.php?id=2047\\_0\\_4\\_0](http://migration.ucdavis.edu/mn/comments.php?id=2047_0_4_0)
- <sup>22</sup> Nieves Ortega Perez, "Spain: Forging and Immigration Policy", February 2003, Migration Information Source, <http://www.migrationinformation.org/Profiles/print.cfm?ID=97>, visited January 4, 2005.
- <sup>23</sup> (Monette, eggs from the case studies – such as the small-scale light engineering manufacturing industry in Northern Italy with its increasing absorption of African labour, agricultural and construction industry in UK, ?? in South Africa).
- <sup>24</sup> Steven Greenhouse, "Illegally in the US, and Never a Day off at Wal-Mart," *New York Times*, 5 November 2003. <http://www.dsusa.org/lowwage/walmart/undocumented.html>
- [Monette, case studies should really address this issue as much as possible: e.g. why, given quite high unemployment rates in Europe, is there still such a demand for undoc migrants; is the received wisdom that indigenous workers don't want dirty, badly paid jobs true or is it that immigrant networks now control recruitment in some key industries?].
- <sup>25</sup> Monette, I have left these speculations of mine in, but as we have discussed it might be advisable to get an expert labour economist to look at this in a little detail – I think it is an absolutely critical issue. If irregular labour really does simply undercut domestic wages and increase domestic unemployment, then we are talking about a redistribution of resources from poor nationals to even poorer non nationals and industrialists, not necessarily a brilliant policy; on the other hand if smuggled workers increase the general health and vitality of domestic economies and supplement domestic labour availability, then the case for increased visas etc is clear, even if one is opposed to an open borders immigration policy. Probably we should rephrase this whole section with e.g. from our case studies about the impact of migrant labour on the domestic economy.
- <sup>26</sup> Monette, Philip, someone mentioned this to us, do either of you remember who?]
- <sup>27</sup> Steven Camarota, *Immigration from Mexico: Assessing the Impact on the United States*, Center for Immigration Studies, 2001.
- <sup>28</sup> George J. Borjas, "Native Internal Migration and the Labor Market impact of Immigration", Malcolm Weiner Inequality and Social Policy Seminar Series, November 1, 2004, unpublished paper on file with the author.
- <sup>29</sup> Christian Dustmann, Francesca Fabbri, Ian Preston and Jonathan Wadsworth (2002) "The Local Labour Market Effects of Immigration in the UK", University College, London.
- <sup>30</sup> "Global transformations and ongoing record low unemployment rates throughout the economy has [sic] generated calls from several other sectors in the US economy for more guestworkers and immigrants... It remains to be seen ... whether or not Congress and the Administration will see the big picture or continue to muddle through with ad hoc responses to episodic economic and political demands". ISIM, 14-15.
- <sup>31</sup> According to an ILO researcher, in 1998, France only granted one visa to a Chinese garment worker; in the same year approximately 2000 Chinese migrants were working illegally in the garment industry in Paris. Personal Communicato, , Gao Yun, ICHRP seminar, August 2004.
- <sup>32</sup> ILO (2004) *Towards a Fair Deal for Migrant Workers in the Global Economy*, International Labour Conference, 92<sup>nd</sup> session, report VI.
- [Monette, may be good to substitute eggs from our case studies instead of these, to make the point that labour migration demand does not match official immigration work permits].
- <sup>33</sup> Kaushik Basu, "Globalisation and Babul Gum", *The Little Magazine* Vol. V (1) (2004) 16.
- <sup>34</sup> <http://www.news.cornell.edu/releases/Dec04/Muslim.Poll.bpf.html>, visited January 10, 2005.
- <sup>35</sup> Associated Press, "Popular Dutch lawmaker urges halt to non-Western immigrants, shutting down radical mosques," November 19, 2004.
- [Monette, could replace this story with one drawn from UK, Italy or other case study country, to make the same point about the pressure to exclude migrants; Monette, I presume you don't want more stuff about xenophobia in the US, prop 187 etc; if you do let me know].
- <sup>36</sup> [Monette, you may want to shift these policy suggestions further down where they would probably fit better – here they just illustrate the point that there are many other types of possible solution].
- <sup>37</sup> [Can we get some info from country researchers about state expenditures on these labour standard measures, and whether they have increased or decreased in line with growth of human smuggling; I suspect the latter in most cases...]
- <sup>38</sup> I owe this interesting observation to Lydia Morris.

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- <sup>39</sup> .[Monette, e.g. from our country researchers about militaristic non entrée policies which heighten the value of smugglers' services].
- <sup>40</sup> UNHCR Population Data Unit.
- <sup>41</sup> DHHS Office of Refugee Resettlement; Migration Policy Institute.
- <sup>42</sup> [Monette, case examples of this would be good; I have lots of eggs from the US – Probably eggs from UK, Italy and maybe S Africa can make the same point].
- <sup>43</sup> Michael Marizco, "Smuggling Children Part I: Young Immigrants become human cargo", November 21, 2004, [The Arizona Daily Star](#).
- <sup>44</sup> Though asylum seekers and refugees are routinely included in the category or "illegal migrants", in fact, of course, there is nothing illegal about entering a country without adequate documents or by subterfuge if the purpose is to apply for refugee protection. The label of "illegal" or "irregular" migrant, so commonly invoked, is inaccurate as a description of the legal status of this category of person I am grateful to Angela Li Rosi of UNHCR Vienna, for an illuminating conversation on this point.
- <sup>45</sup> Ko-lin Chin, "The Social Organization of Chinese Human Smuggling" in [Global Human Smuggling: Comparative Perspectives](#) at [http://usinfo.state.gov/eap/Archive\\_Index/The\\_Social\\_Organization\\_of\\_Chinese\\_Human\\_Smuggling.html](http://usinfo.state.gov/eap/Archive_Index/The_Social_Organization_of_Chinese_Human_Smuggling.html)
- <sup>46</sup> [Philip can you fill this in please?]
- <sup>47</sup> Centro Studi di Politica Internazionale, *L'Italia nel Sistema Internazionale del Traffico di Persone*, December 1999.
- <sup>48</sup> [Monette, eggs from case studies would be better than these eggs if we can get them – most important is a hard cash figure showing the jump in cost over a short period].
- <sup>49</sup> David Kyle and Zai Liang, "Migration Merchants: Human Smuggling from Ecuador and China," Working Paper No. 43, University of San Diego Center for Comparative Immigration Studies, October 2001.
- <sup>50</sup> Charlie LeDuff, "After the Crossing, Danger to Migrants Isn't Over," *New York Times*, November 11, 2003.
- <sup>51</sup> P. Martin and M. Miller (2000) "Smuggling and Trafficking: A Conference Report (Critical Essay)" in *International Migration Review*, Fall 2000 34(3): 969; and Jonas Widgren (1994) "Multilateral Cooperation to Combat Trafficking in Migrants and the Role of International Organizations," discussion paper submitted to the 11<sup>th</sup> IOM Seminar on Migration, 26-8 October 1994, Geneva.
- <sup>52</sup> Eggs of different types of smuggling arrangements from case studies should be included here].
- <sup>53</sup> [Monette, this section is probably far too long, but I thought it best to be inclusive at this stage – cutting is easier than adding]
- <sup>54</sup> Hannah Arendt, [The Origins of Totalitarianism](#) (1951)
- <sup>55</sup> SR on Migrants' Rights 2000, para. 26-8
- <sup>56</sup> Joan Fitzpatrick (2003) "The Human Rights of Migrants," in T. A. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, T.M.C. Asser Press, The Hague: 170.
- <sup>57</sup> Fitzpatrick (2003): 172.
- <sup>58</sup> [Monette, not sure how long or short this list should be, these are just a few eggs picked out for particular relevance, but we could have a footnote with a comprehensive list if you think that would be useful].
- <sup>59</sup> This inclusive interpretation of the ICCPR has been upheld by the UNHCHR General Comment 15, on "The Position of Aliens under the Covenant" (1986). This document affirms that, regardless of citizenship and immigration status, **merely being present in a state and under its jurisdiction is enough to trigger the Covenant's application.**
- <sup>60</sup> OHCHR (1986) General Comment No. 15: "The Position of Aliens under the Covenant": para. 9.
- <sup>61</sup> The High Commissioner for Human Rights' General Comment also notes that, **while non-nationals do not generally enjoy the right to entry and residence in the state in question (Article 12), there may be certain "considerations of non-discrimination, prohibition of inhuman treatment, and respect for family life" that arise to tip the balance in the migrant's favour.** General Comment 15 (1986): para. 5.
- <sup>62</sup> Article 4: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."
- Article 12(3): "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."
- <sup>63</sup> Fitzpatrick (2003): 172. **Article 8 of the GC notes that "equal" treatment does not mean "identical" treatment.**
- <sup>64</sup> OHCHR (1989) General Comment 18 "On Non-Discrimination": para. 8. See also Fitzpatrick (2003): 174.
- <sup>65</sup> Fitzpatrick (2003): 175.

- <sup>66</sup> Article 4 ICESCR: “[T]he State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”
- <sup>67</sup> Durban Declaration agreed by the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.
- <sup>68</sup> Committee on the Elimination of Racial Discrimination, “Discrimination against Non-Citizens,” General Recommendation 30.
- <sup>69</sup> Margot Mendelson, “The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women”, 19 *Berkeley Women's Law Journal* (2004) 139.
- <sup>70</sup> The vagueness of the terms “traffic in women” and “exploitation” necessitated General Recommendation 19, which refers to practices like sex tourism, forced prostitution, organised marriages and domestic servitude as being incompatible with women’s rights and endangering their safety (Paragraph 14).
- <sup>71</sup> J. Bhabha, “Children, Migration and International Norms” in ed. T. Alexander Aleinikoff and V. Chetail, *Migration and International Legal Norms* (The Hague: T.M.C. Asser Press. 2003) 203-4. [hereafter Bhabha, norms].
- <sup>72</sup> “... unless, under the law applicable to the child, majority is attained earlier”, CRC Art. 1.
- <sup>73</sup> Some migration destination states, such as the UK and Germany, have entered reservations to the CRC which stipulate that its provisions cannot affect implementation of domestic immigration and nationality law. Bhabha norms, 213. The remainder of this paragraph draws on heavily on parts of that chapter.
- <sup>74</sup> Fitzpatrick (2003): 172.
- <sup>75</sup> Bhabha norms, 211-212.
- <sup>76</sup> Because the definition in Article 1(A) is descriptive, not constitutive,
- <sup>77</sup> Article 3 of the 1956 Slavery Convention does, however, prohibit conveying slaves across international borders.
- <sup>78</sup> Fitzpatrick (2003): 171.
- <sup>79</sup> Commission on Human Rights (1999) “Human Rights of Migrants” resolution 1999/44, para. 3.
- <sup>80</sup> [Monette, it would be great if the ILO people could agree to look this section over and check for accuracy etc.]
- <sup>81</sup> Gao Yun, *Chinese migrants and Forced Labour in Europe*. ILO Research Paper July 2004, 3.
- <sup>82</sup> Elizabeth Bruch (2004) “Models Wanted: The Search for an Effective Response to Human Trafficking,” *Stanford Journal of International Law* 40:1, n. 46.
- <sup>83</sup> See ILO (2004) *Towards a Fair Deal for Migrant Workers*: para. 291
- <sup>84</sup> See Articles 9-11.
- <sup>85</sup> [Monette, some eggs from case studies of the links or lack of links between labour rights and human rights NGOs, approaches, outcomes and maybe analysis of what does and doesn't work – e.g. I imagine in Italy there has been involvement of unions, in the UK there certainly was by the T&G in the 1970s and 1980s re undocumented migrants rights; do the ILO conventions make any diff in these situations given the lack of an implementation mechanism?]
- <sup>86</sup> Report of the Special Rapporteur on the Human Rights of Migrants (6 January 2000) “Specific Groups and Individuals: Migrant Workers: Human Rights of Migrants,” E/CN.4/2000/82: para. 86.
- <sup>87</sup> This is the logic behind the concept of refugee *sur place*. Hathaway writes about this . . . citation?
- <sup>88</sup> Special Rapporteur on the Human Rights of Migrants, E/CN.4/2000/82: para. 30-3.
- <sup>89</sup> Monette, not at all sure whether we want any of this, but it's interesting!
- <sup>90</sup> Anti-slavery legislation was being drafted concurrently in international fora—the League of Nations produced the Slavery Convention in 1926, and the United Nations produced the [Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery](#) in 1956—but this was considered a separate issue from trafficking. Despite their now obvious connections, neither sphere of legislative activity informed the other (Bruch 2004: 7). The gender-based separation of forced labour is still in evidence today – viz the special preoccupation with trafficking of “women and children”.
- <sup>91</sup> The pre-League of Nations instruments suggest that states entrust victims’ assistance to “charitable institutions.” No mention of what such assistance should entail. The 1949 Convention introduces a few new protection provisions: it allows aliens to participate in proceedings against their traffickers (article 5); forbids states to force prostitutes to register or carry special ID cards (article 6); makes the “temporary care and maintenance” of victims prior to repatriation the state’s responsibility (article 19.1); and it calls on states, albeit vaguely, to encourage public and private social services to facilitate prevention and victims’ rehabilitation (article 16). This is still very weak as protection goes.
- <sup>92</sup> Bruch 2004: 4.
- <sup>93</sup> Chung 1998: 75-6.
- <sup>94</sup> See the Preamble to the 1949 Convention.
- <sup>95</sup> GA Resolution 48/102 (20 December 1993).
- <sup>96</sup> The draft convention was submitted at the 52nd Session of the UNGA – UN doc. A/52/357 (17 September 1997); a similar proposal had been presented but subsequently withdrawn by the US a year earlier – ECOSOC

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- Press Release SOC/CP/192, 5 June 1996, fifth Session of Commission on Crime Prevention and Criminal Justice, Vienna 21-31 May 1996.
- <sup>97</sup> Proposed Multilateral convention to combat illegal migration by sea, IMO doc. LEG 76/11/1, 1 August 1997.
- <sup>98</sup> IMO doc. LEG 76/11/1. Cited in Kirchner, A. and Di Pepe, L.S. (1998) "International Attempts to Conclude a Convention to Combat Illegal Migration" *International Journal of Refugee Law* 10(4): 665-6.
- <sup>99</sup> CPCJ Draft Resolution to ECOSOC (E/CN.15/1998/11).
- <sup>100</sup> Informal note for Session 4 of Ad Hoc Committee submitted by UNHCHR.
- <sup>101</sup> UNHCR, UNICEF and IOM joint note submitted for Session 8.
- <sup>102</sup> [Monette/Philip, one of the interviews we did in Geneva or Vienna covered this – someone told us that law enforcement agents don't like searching vessels for concealed, abused migrants because they end up with responsibility for them; check notes.
- <sup>103</sup> The US has signed both the Convention and the 2 Protocols, but has not ratified any of them to date. [enter the number of ratifications into the report when we go to press, as a way of quantifying the extent of international support].
- <sup>104</sup> Except in the case of children: incl. section of Art. 3 on children.
- <sup>105</sup> There are exceptions to this – see Salt and Stein, "Migration as a Business: The Case of Trafficking", who use the term "trafficking" in a broad sense that does not require coercion of migrants or exploitation: they define "trafficking" as "an international business, involving the trading and systematic movement of people as "commodities" by various means and potentially involving a variety of agents, institutions and intermediaries", 35 *International Migration* 467, at 471.
- <sup>106</sup> [Can country researchers find ANY evidence of state expenditure on these expansive goals – I doubt it; perhaps we can get facts/figures from the UN regarding budgets and allocation of funds for these non enforcement goals?]
- <sup>107</sup> Art.14, 15.
- <sup>108</sup> Again this provision represents a lower level of protection for the migrant than the corresponding article in CMWF (art. 17(3)).
- <sup>109</sup> Gao Yun, 2.
- <sup>110</sup> The following paragraphs draw heavily on the work of Alan Wertheimer, see in particular Coercion. (Princeton: Princeton University Press. 1987). [hereafter Wertheimer].
- <sup>111</sup> Wertheimer, 6.
- <sup>112</sup> For example the philosophers Robert Nozick, and John Rawls, see Wertheimer 5.
- <sup>113</sup> Can country researchers supply some figures].
- <sup>114</sup> I am grateful to Kate Desormeau for this pithy formulation.
- <sup>115</sup> Frankfurt, "Coercion and Moral Responsibility" in Essays on Freedom of Action, ed. Ted Honderich (London: Routledge and Kegan Paul, 1973) 71 – 72, quoted in Wertheimer, 225.
- <sup>116</sup> Wertheimer, 226.
- <sup>117</sup> [This is unlikely to survive the final draft]
- <sup>118</sup> Luis Alberto Urrea, The Devil's Highway (Little, Brown & Co. , New York. 2004) 37-38. Ironically, the only other very expensive investment directed at smuggled migrants are the medical costs involved in resuscitation and dehydration services from emergency services. In the US, if the migrant is arrested, then the medical costs have to be born by the federal government, but if the migrant is simply turned over to the hospital for life saving purposes, then the hospital has to cover the bill. At the University Medical Center in Tucson, AZ, in the year 2000, about \$6.5 million (unrecoverable) were spent on treatment of undocumented migrants – 180. Urrea comments wryly: " elder care, emergency services and long-term care for American citizens were forced to shut down all over Arizona as the toll mounted". 180.
- <sup>119</sup> [This is just a very first stab at this – presumably this section will be radically revised if not rewritten at the end of the project, but this is simply intended as a list of elements which need to be included].
- <sup>120</sup> International courts have established conclusively that states are responsible for human rights violations committed outside their jurisdiction on deportee, where the deporting state could have foreseen the violations, see *Soering v UK* (1989) 11 EHRR 439; *Ng v Canada*, Human Rights Committee Communication No. 469/1991, 5 November 1993.
- <sup>121</sup> ILO colleagues could help out here
- <sup>122</sup> In one incident in Paris, working inspectors raided a garment workshop and found 10 undocumented, smuggled Chinese migrant workers; they were held in detention for 2 days, and then released. Because they had no passports, they could not be deported to China. In another case, some Chinese irregular workers called the police to be rescued from a coercive working relationship; they were detained for 15 days by the French authorities and then released. Nothing changed in the workplace in either incident. Gao Yun, personal communication, ICHRP meeting, Geneva, August 18, 2004.
- <sup>123</sup> (10 years?) – in some countries e.g. US this will seem like a ludicrously utopian demand, but of course it is already practice in the UK and I suspect, but don't know, in other EU states too.

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<sup>124</sup> Fadele v UK, EcommHR ???

<sup>125</sup> Trafficking Protocol Art. 9; Smuggling Protocol Art. 15.

<sup>126</sup> Council Framework Decision 2002/90/EC “on preventing the facilitation of unauthorized entry and residence”; Council Framework Decision 2002/946/JHA “on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence”; Council Framework Decision 2002/629/JHA “on combating trafficking in human beings.”

<sup>127</sup> Council Directive 2004/81/EC “on the short-term residence permit issued to third-country nationals victims of trafficking in human beings or to third-country nationals who have been the subjects of an action to facilitate illegal immigration who co-operate with the competent authorities.”

<sup>128</sup> The Commission’s first draft included the term “useful,” which the European Parliament later changed to “relevant” in order to mitigate the instrumental tone. See Proposal for a Council Directive, COM/2002/0071.

<sup>129</sup> Proposal for a Council Directive (COM/2002/0071), Article 2.2.2.

<sup>130</sup> Draft Report of the European Experts Group on Trafficking in Human Beings, Brussels 26 October 2004, 68.

<sup>131</sup> UN High Commissioner for Human Rights Guidelines Number 6.

<sup>132</sup> Experts Group, 132.

<sup>133</sup> [www.legislationline.org/data/Trafficking/EU/Frameworkdecision\\_penalframework.pdf](http://www.legislationline.org/data/Trafficking/EU/Frameworkdecision_penalframework.pdf)

<sup>134</sup> [This is unlikely to survive editorial scrutiny, but again, I think it is true!!]

<sup>135</sup> [Political judgement required...]

<sup>136</sup> [I think, but would like this to be discussed by the whole group at the next meeting]

<sup>137</sup> No final punchline at this stage...